

No. 11662-11666

United States
Circuit Court of Appeals
For the Ninth Circuit.

PHILLIP HIMMELFARB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SAM ORMONT,

Appellant,

vs.

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Transcript of Record

IN FOUR VOLUMES

VOLUME III

Pages 889 to 1266

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for the Southern District of California
Central Division

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(Testimony of J. Bryant Eustice.)

Los Angeles, California, Wednesday, June 4, 1947
2:00 P.M.

(The following proceedings were had outside
the presence of the jury:)

The Court: United States vs. Ormont and Him-
melfarb. The motions and affidavits have been
served upon the District Attorney.

Mr. Robnett: Yes, your Honor.

The Court: Are you ready at this time?

Mr. Strong: Yes, your Honor.

The Court: Very well.

Mr. Robnett: Your Honor, this is a motion to
quash subpoena, and to quash the service of the
same, a duces tecum subpoena, which is set forth
verbatim in the motion, and was issued the 2nd day
of June, 1947, addressed to Sam Ormont, one of the
defendants in this case; also to the Acme Meat Com-
pany, Acme Meat Company, Inc., and was served
on Mr. Ormont, according to the affidavit that is
filed in support thereof, yesterday, the 3rd day of
June, 1947, in the court room, during the progress
of the trial.

The affidavit further shows that Mr. Ormont is
a party defendant in this action, and in each count
thereof; that the papers, books and records that are
in his possession, and the only ones in his possession,
are his own personal papers, books and records, as
Sam Ormont, or Sam Ormont, an individual doing
[742] business under the fictitious name and style
of Acme Meat Company.

(Testimony of J. Bryant Eustice.)

That there are no books or papers in his possession of the corporation Acme Meat Co., Inc., and the affidavit shows that the corporation was not organized until May 29, 1946. The subpoena calls for books, papers and records during the years 1944 and 1945, which, of course there was no corporation then, and that Mr. Ormont is the sole individual that was doing business as Acme Meat Company during that time. That this would be requiring him to furnish evidence against himself, in violation of the Constitution of the United States, and of the rules of court.

The Court: I would like to hear from the District Attorney.

Mr. Strong: The first thing I want to say, your Honor, is that the service made in the court room was wholly without my knowledge, and without my suggestion. In fact, had I known such a thing was intended, I certainly would not have permitted it. As a matter of fact, I don't permit services in the halls of this building on anybody. I always require that be done outside, in the streets. It was not at my suggestion.

The Court: I don't think the defendant suffered any prejudice by virtue of that. I knew that the man was a Deputy Marshal.

Mr. Strong: It was a lady. [743]

The Court: Yes. I remember, and a good looking lady, too. That can go into the record. And that it had to do with some process, but I doubt that

(Testimony of J. Bryant Eustice.)

the jurors did, and there has been no showing that they did.

Mr. Strong: As to the other point, I, of course, am fully familiar with the guarantees contained in the United States Constitution against self incrimination. I am also familiar that where documents are in the possession of a third party, who is not a defendant—that those documents can be subpoenaed. That was why we included the Acme Meat Co., Inc., which we understood was the successor in point of time to the Acme Meat Company. If they don't have the books, of course, they cannot produce them.

The Court: The Acme Meat Co., Inc., if it is a corporation, and it has any records relating to that matter, you would be entitled to have them. The defendant's affidavit states that there is nothing in the records of the Acme Meat Co., Inc., relating to any loans to Phillip Himmelfarb during the years in question.

Mr. Strong: We are not talking about the records of the Acme Meat Co., Inc., but rather the Acme Meat Company, an entity, having physical possession of the records of either Mr. Ormont or the Acme Meat Company, a partnership.

The Court: It was not a partnership, according to the records before me. It was an individual doing business under [744] the fictitious name of Acme Meat Company, which still makes it an individual, and his records.

Mr. Strong: That is what we were attempting from the corporation.

(Testimony of J. Bryant Eustice.)

The Court: I don't believe you would be entitled to a subpoena againts Sam Ormont, or Sam Ormont doing business as Acme Meat Company.

Mr. Strong: I pointed out why I had issued that subpoena, because of my misunderstanding of what your Honor had meant.

The Court: As to the Acme Meat Co., Inc., there is no showing here, if you desire their books and records for inspection, to determine whether or not the books and records of Acme Meat Co., Inc., do reflect anything concerning loans. I don't see how it could, because it was not incorporated.

Mr. Strong: I don't desire the records of the Acme Meat Co., Inc.

The Court: The subpoena will be quashed. [745]

Mr. Strong: Now may I be heard—I know while the jury was here your Honor didn't let me do any arguing—I would like to be heard for a few minutes on some of these other matters.

The Court: Very well.

Mr. Strong: All of the questions which were directed to the witness Eustice with reference to his conversations with the defendant Himmelfarb as to the contents of the pages of the Acme Meat Company records which deal with Himmelfarb preliminarily, I believe that under the law where a defendant is shown to have examined or looked at or discussed the contents of a page, even though it is not his page, it is somebody else's page, that if he is shown to have knowledge of those figures that are on that page and then the page is shown to be

(Testimony of J. Bryant Eustice.)

unavailable, that it can be shown prior to the offering of secondary evidence, that it can be shown that he knows what is on that page and he discussed it, and that the contents of that page, or agreed to, or approved by him, or accepted by him as being true.

The Court: It all resolves itself around the proposition if a conversation is admissible as against interest by the defendant Himmelfarb. If at the time he had the conversation with the defendant Himmelfarb, if the witness Eustice had certain facts and figures, you would not be able with the witness Eustice's facts and figures that he had copied there, [746] but you would be able, if the conversation is otherwise admissible, to get into the evidence all that he showed the defendant Himmelfarb.

Mr. Strong: This is one page which they discussed.

The Court: I can see that, but it is only by virtue of an admission against interest. Therefore it requires knowledge on the part of Himmelfarb before it can be an admission. Consequently Eustice must have communicated to Himmelfarb or must have shown him the document so that he would know what he was admitting or discussing. But I have sustained the objection so far because you haven't laid the foundation for that.

Mr. Strong: That depends on what your Honor regards as the foundation.

The Court: The foundation is for a conversation or for an admission against interest.

Mr. Strong: The objection that was sustained

(Testimony of J. Bryant Eustice.)

dealt with the failure of presenting evidence as to the corpus delicti. The objection was on the ground that since there was no evidence of a corpus delicti in this case you couldn't introduce admissions.

The Court: I sustained the objection up to this point on the ground that there was no foundation for the admission against interest, among others, that there was no corpus delicti proved, and among others the fact that he was having a [747] conversation with two Government officers, and in the present state of the record I doubt if the conversation is admissible because they were investigating him from a criminal point of view and did not warn him of his rights.

Mr. Strong: If I may suggest, the record is to the contrary; they were not investigating him from a criminal point of view. That is what the witness testified to in answer to a question I think by your Honor.

The Court: That might have been what the witness Phoebus thought but the fact is he is now charged with a crime based on that investigation. So it was an investigation looking towards a criminal prosecution, and it was their duty to warn him, not only that they were Government officers, which Mr. Eustice did but which Mr. Phoebus, very candidly admitted, he didn't know whether he had done it the first time or not but that subsequently he told him. But to also warn him that he need not make any statement or that anything he might say might be used against him.

(Testimony of J. Bryant Eustice.)

Mr. Strong: May I just address myself first as to whether or not the fact that a criminal prosecution follows is necessarily a factor which might vitiate an examination made at a time when no criminal prosecution was contemplated.

At the time they were investigating him, as I understand the record, they were looking to find out what the status of the taxpayer's income was and whether he had paid his whole [748] tax. They do not make a determination as to whether a criminal case will or will not be had.

The Court: I know they do not make that determination, but they do the investigation in advance. In fact, I can take judicial notice of the fact that in the Internal Revenue Department there are the different categories of duties: There is the deputy collector, whose duties are limited. They do not have the power nor the duty to make a criminal investigation.

Then there are the agents, such as Mr. Eustice, who do the auditing. He does not institute criminal investigation or recommend them.

But when it goes to the special agents, that is their job. In other words, I think I can take judicial notice of this, that a criminal prosecution is not instituted in connection with an income tax violation until it has gone through the special agent's division.

Mr. Strong: That is probably so, but that doesn't

(Testimony of J. Bryant Eustice.)

necessarily follow that each examination is followed by a criminal prosecution.

The Court: This one is.

Mr. Strong: As to that point I submit to your Honor, without any argument, that the defendant knew what the investigation was about because the witness Eustice told him what he was there for, he was investigating his income tax returns [749] and he was investigating the income, and that I think that if it is at all necessary for any of the agents to make a disclosure as to what they are doing or who they are, the fact that Mr. Eustice did so is sufficient to cover any other agent present since they were all there together from the Internal Revenue Bureau all on the same investigation.

But to go one step further, I would like to point out to your Honor—I suppose your Honor has had it pointed out to you before, but I would like to point out these decisions which indicate, even where there is no warning, it doesn't make the slightest bit of difference.

Here is the case of *Morton v United States*, 147 F (2d) 28, which is the United States Circuit Court of Appeals for the District of Columbia, certiorari denied in 65 Supreme Court 105. Reading from page 31 of Volume 147 F (2d) it says:

“The trial court admitted testimony of a police officer concerning admissions made to him by appellant after his arrest. Its admissibility is challenged on the ground that when the appellant was questioned he was nervous

(Testimony of J. Bryant Eustice.)

and jittery and was very much under the influence of liquor, the police did not at any time warn him whatever he said would be used against him or even tell him that he was charged with any crime and therefore he had no reason to think that he needed counsel. These facts [750] assuming their correctness, did not render the admission inadmissible. Even a confession given under such circumstances would have been admissible. The rules governing the reception in evidence of admissions are much less onerous than those concerning confessions.”

Then they go on discussing the difference between a confession and an admission.

Well, in this case all that we are getting at at this point—and I want to emphasize that again—we aren’t discussing what those figures show in so far as they may reveal any criminality or in so far as they may reveal additional income—that I intend to show by secondary evidence—all I want to show at this point is that this secondary evidence is good as against this defendant because he had knowledge of the contents of the page from which this transcript was made, because he discussed that page and indicated that he knew what those facts are on it. And just on the basis of that testimony I submit that that secondary evidence is admissible.

The Court: Let me see your page. Where is your page?

(Testimony of J. Bryant Eustice.)

Mr. Strong: The original record?

The Court: No, you say you have a page.

Mr. Strong: I am talking about the one page in the original record from which a transcript was made.

The Court: You say you are going to have secondary evidence. [751]

Mr. Strong: Yes. That is the testimony of the witness Eustice.

The Court: That wouldn't be secondary evidence; that would be primary evidence of an admission against interest.

Mr. Strong: But it isn't an admission until he says something.

The Court: I know it is not, but if you show it to him and he knows it and then he says something, why then it is an admission against interest.

Mr. Strong: But he wasn't talking about this particular sheet of paper, he was talking about the original record which they were examining and which is now not available. That is the one which I want to show that the defendant Himmelfarb saw.

The Court: What did he show him?

Mr. Strong: He showed him the original record.

The Court: You mean Mr. Eustice showed him the original record?

Mr. Strong: They were at the Acme Meat Company, Mr. Eustice is looking at the original record and he shows it to Mr. Himmelfarb and they discuss it.

(Testimony of J. Bryant Eustice.)

The Court: Now your secondary evidence, as you call it, is Mr. Eustice's record of what was on that sheet?

Mr. Strong: Yes. [752]

The Court: Let me see it.

(The document referred to was passed to the Court.)

The Court: What is your point? What you are trying to prove is that Mr. Eustice and Mr. Phoebus talked to Mr. Himmelfarb on or about the date that has been or will be established in testimony, and that at that time Phillip Himmelfarb admitted that he had received \$4500 in withdrawals against share of profit for April and July——

Mr. Strong: No, your Honor, that is not what I am trying to show.

The Court: What are you trying to show?

Mr. Strong: I am trying to show he had a conversation with him on that date at the Acme Meat Company, that at that time they had available and before them the original records of the Acme Meat Company with the account of Phillip Himmelfarb. They turned to that page. All I want to show at this point is that they discussed with him those figures without going into what they said at all and that he said that they were correct and accurate. That is all. Then I want to show what those figures are by introducing this second best proof because we do not have the original record.

(Testimony of J. Bryant Eustice.)

I am not going to have him testify to Mr. Himmelfarb admitting anything.

The Court: I thought you just said that he admitted that they were true and accurate.

Mr. Strong: Yes, but not as to what the figures show. [753] In other words, he had knowledge of the contents of that page. That is what I am trying to show. Having had knowledge of the contents of the page, then that record——

The Court: In other words, in substance you are offering to prove that the witness Eustice will testify that on or about that date he talked to the defendant Himmelfarb, that he showed the defendant Himmelfarb the page of the accounts of the Acme Meat Company, that on that page were these items?

Mr. Strong: That I will show later; that on that page were some items.

The Court: These items?

Mr. Strong: I am not going to ask him at this point because that is the secondary evidence going in. [754]

Mr. Strong: The point is, I want to show the items they discussed, and he accepted those items.

The Court: What items?

Mr. Strong: Those items will then be shown in the testimony of these witnesses.

The Court: To be those items?

Mr. Strong: That is the second proposition, in lieu of the original record. As I understand it——

The Court: Wait just a minute. Let me get

(Testimony of J. Bryant Eustice.)

this straight. I think we are talking a little at cross purposes. As I said they can only be admitted as admissions against interest; therefore, they must be conversations; therefore, they must be something he knew before he could admit it. I understand your proposed offer of proof is that Eustice showed him the page upon which these items were?

Mr. Strong: Yes.

The Court: Then Himmelfarb said he knew they were there, and they were correct, and that is, in substance, what you want to prove?

Mr. Strong: Yes. I want to prove these aspects of the objection, which your Honor sustained; that is, in reference to the books and records which the defendant Himmelfarb himself did not write. Of course, if he had not written them, there would be no proffer.

The Court: I understand that is true as to this whole item? [755]

Mr. Strong: Yes.

The Court: You haven't yourself claimed——

Mr. Strong: I also call your Honor's attention to the case of the United States vs. Hydner.

The Court: Wait until I look at the Merton case a minute.

Mr. Strong: All right.

The Court: In the Morton case, in reading that case, it does not appear that there was any conversation introduced, except the one question, that the police accused him of murdering Mrs. Groom, to which he answered no. That, the court substantially

(Testimony of J. Bryant Eustice.)

held he could not be harmed by that statement; that that was actually not an admission against interest. They recite here, that otherwise he gave the conversation: Yes, and what do you want? He said yes, when they opened the door, and asked them what they wanted, and they said they were from police headquarters, and wanted to talk to him. He met the inspectors, and said: What do you want? They said: You will find out when you get down there. Then they searched the room, and found bloody clothes, and other evidence, and the court held that that independently was sufficient to cause them to have a duty to arrest him. I don't think this would be authority. They did not raise in that case the question of failure to prove the corpus delicti. [756]

Mr. Strong: I am now talking primarily on the question of whether or not these agents had to disclose they were investigating about anything they said could be used against them. I think point 12 is directly on the point, where it said the trial court admitted testimony against interest.

The Court: They went on and said: Did you murder Mrs. Groom? He said no. That would not be an admission.

Mr. Strong: No. But they discussed the law in the way of admissions which may be admitted. I think in that case they pointed out, even if a police officer doesn't warn you, that it is not an admission. In the case in 149 Fed. 2nd, 105, there again the objection was that the policeman asked the de-

(Testimony of J. Bryant Eustice.)

fendant what he had in the building, but did not tell him that the answer might be used against him.

The Court: What was the answer?

Mr. Strong: Whatever the answer was.

The Court: I know, but by the time these go up to the Circuit Court of Appeals, they write a very instructive discussion of the law, and finally wind up, as they did in the Martin case, that it would not make any difference anyhow. If we apply it wrong, they say it is not the law. Then they say it is dicta. Here, he was arrested, and in the custody of the officers. This fellow knew he was wanted for something.

Mr. Strong: This defendant knew they were investigating his income tax returns. [757]

The Court: But they did not know they were investigating them for a criminal prosecution.

Mr. Strong: In the other case he did not know what he was wanted for. Your Honor said he knew he was wanted for something.

The Court: He was arrested. They arrested him for violation of the Liquor Act. They found him in possession of a liquor still, making liquor out of prune juice.

Mr. Strong: It's not good liquor.

The Court: I have forgotten.

Mr. Strong: I know.

The Court: In this case they had just taken him to jail, and he started talking.

Mr. Strong: I don't know how far I have succeeded in convincing your Honor, but that was all

(Testimony of J. Bryant Eustice.)

offered in reference to the use of the defendant Himmelfarb's statements to the effect that these pages were accurate, for the purpose of showing by secondary evidence what those pages contained. There are other reasons why this secondary evidence should be admitted. First of all, there are several cases which hold that where there are several defendants——

The Court: If you are able to establish a proper foundation, then I will admit the testimony of the witness Eustice, to the general effect as you have recited it to be, to-wit: 'That he had a conversation; that he showed him the book and [758] page; that on that page were these items; that he called Himmelfarb's attention to it, and Himmelfarb said they were correct.

Mr. Strong: I was under the impression that we had established the proper foundation.

The Court: That is all we are arguing about now, as to whether you had. I think the officers were under duty to warn him that the statement might be used against him.

Mr. Strong: The evidence already is that Mr. Phoebus did not warn him, but Mr. Eustice indicated who he was.

The Court: There are millions of investigations. They send out a mimeographed letter, which said: Explain the item for \$2.48, taxicab fare from Chicago Union Depot. It seems like the Attorney General—from the Chicago Union Depot to some place else.

(Testimony of J. Bryant Eustice.)

Mr. Strong: I will pass, your Honor, to another point I want to make. The evidence of what they said is already in. If your Honor says that is not sufficient to establish a basis, that is all I have on that point, because he testified to what was said.

The Court: He hasn't testified to what was said.

Mr. Strong: Your Honor said the proper foundation had to include a showing on their part.

The Court: I don't think you have shown any corpus delicti. I realize that in tax cases, and in most cases [759] involving any complications at all, that the order of proof sometimes is very difficult, but I don't think you can prove this offense by an admission of the defendant.

Mr. Strong: I am not seeking to, your Honor, but I can not get the books, your Honor.

The Court: Then you will have to establish the corpus delicti some other way before you attempt to establish it by admission. I don't think the foundation is sufficient to admit this testimony as to conversations with Himmelfarb, as presently identified.

Mr. Strong: On the second reason, as to why secondary evidence of the contents of these books should be admitted.

The Court: Do you mean, other than what you have indicated?

Mr. Strong: Other than the question of the conversation with Himmelfarb.

The Court: You have other evidence?

Mr. Strong: No; I have other reasons why this

(Testimony of J. Bryant Eustice.)

evidence should go in, and I should like to be heard on that.

The Court: All right.

Mr. Strong: First of all, there are cases that hold where there is more than one defendant on trial for the same offense—in this indictment Counts I and II, both defendants are on trial for the same offense—that where books of one of the defendants are held by one of the defendants, and he refuses [760] to give them up because of his constitutional privilege, that secondary evidence of the contents of those books can be introduced as to the second defendant. As to the first one, there is no problem. As to the second defendant——

The Court: That would be hearsay.

Mr. Strong: Those books are unavailable for a reason.

The Court: Assuming you are correct on that, Mr. Strong, it would still be hearsay as to the defendant Himmelfarb, which was the original objection made by Mr. Katz. What the books of the Acme Meat Company said about Himmelfarb is hearsay as to Himmelfarb. He has no control over them.

Mr. Strong: There are cases which hold—one is the case of *Wilkes v. United States*, 80 Fed. 2nd, 285.6211,—that the books of a corporation can be used to show certain factual entries thereon against an individual who is not an officer of the corporation, and did not make the entry. Then there is the case in which the books of the company were

(Testimony of J. Bryant Eustice.)

used to show the value of lots as recorded on those books, not against the company, but against some other party. That is the case of *United States v. Beck*, 118 Fed 2nd, 178.

The Court: No. 7 says books of the corporation are admissible where the corporation is shown to have been dominated and controlled by defendant against whom they are offered. And there is no showing here to that effect. The showing is just to the contrary, and as I understand your avowed position, it [761] is contrary, that Himmelfarb was a partner.

Mr. Strong: I think we will save time by going to my third point, which is that I want to show that Himmelfarb was a partner, and consequently the books and records are evidence against him, even by secondary evidence, and as to that I have three witnesses, your Honor, I would like to put on for the specific purpose of showing that Himmelfarb himself told outsiders, and through documentary evidence, which I have——

The Court: Other than the books of the Acme Meat Company.

Mr. Strong: The proof I have in my hands.

The Court: Let me see it so that we can save time.

Mr. Strong: I want to show that the defendant Himmelfarb obtained these policies in which he had himself and Ormont named as co-partners doing business as Acme Meat Company, and that he so

(Testimony of J. Bryant Eustice.)

advised the agent, that he was a partner of Ormont during the period in question; and these documents, which are documents dealing with the Acme Meat Company, insurance, in which the Acme Meat Company is signed by Phillip Himmelfarb.

The Court: Oral admissions of a party made under such circumstances, it occurs to me, are admissible.

Mr. Strong: The third item of evidence is the return, Government's Exhibit 6, which they denominated for that period a joint venture. The books would be admissible as to either one.

The Court: The books would be admissible?

Mr. Strong: As against either, or evidence of the contents of the books.

The Court: If they voluntarily disclosed it. All right. Call the jury down.

The usual stipulation?

Mr. Strong: The usual stipulation.

Mr. Katz: Yes.

Mr. Robnett: So stipulated.

The Court: Do you wish to withdraw the witness Eustice from the stand?

Mr. Strong: May I?

The Court: Yes.

(Witness temporarily excused.)

Mr. Strong: May I have these two sets of documents marked for identification?

The Clerk: 44 and 45.

The Court: 44 is a policy?

The Clerk: Yes, your Honor.

The Court: 45 is a claim or something.

(The documents referred to were marked Government's Exhibits 44 and 45 for identification.)

DAVID L. GORGERTY

a witness called by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your address?

The Witness: 2841 Mary Street, La Crescenta.

Direct Examination

By Mr. Strong:

Q. What is your occupation?

A. Insurance broker.

Q. Do you represent the Patriotic Insurance Company of America?

A. I write some insurance with them, or I wrote a policy with them in 1944.

Q. Are you with any insurance agency here?

A. I operate my own agency and insurance broker.

Q. What is the name of it?

A. David L. Gorgerty, insurance broker, at 111 West Seventh Street, Los Angeles.

Q. Now, Mr. Gorgerty, I show you a document that has been marked as Government's Exhibit 44 for identification and ask you if you ever saw that before, and Government's Exhibit 45 for identifica-

(Testimony of David L. Gorgerty.)

tion and ask you if you ever saw that before.

A. (Examining documents) Yes, I have seen both of these instruments before.

Q. As to Government's Exhibit 44 for identification, will you state whether you had that policy issued, that document issued? A. I did.

Q. At whose request?

A. At the request of Mr. Himmelfarb. [764]

Q. Is that the Mr. Himmelfarb who is sitting over here at the defense table?

A. Yes, the same Mr. Himmelfarb who is seated at the counsel table.

Q. When did you have it issued?

A. It was issued on the 3rd of April, 1944.

Q. Did you speak to Mr. Himmelfarb or did he speak to you on that occasion?

A. Well, this policy was issued in lieu of another policy that a company cancelled, and I took this policy to Mr. Himmelfarb when it was issued together with a bill for the difference in the premium between this one and the one that had been cancelled.

Q. Is this policy——

The Court: Just a moment. He hasn't answered your question. The question was, did you speak to Mr. Himmelfarb.

The Witness: And I delivered the policy to him and told him that it was in lieu of the other.

The Court: No. You spoke to him?

The Witness: I spoke to him; that is right.

The Court: All right.

(Testimony of David L. Gorgerty.)

Q. (By Mr. Strong): Was this the first time you spoke to Mr. Himmelfarb concerning the policy? A. No. [765]

Q. When was the first time?

A. About September or October, 1943, I wrote a policy for him.

Q. No, no, I just want the date. That is the first time you spoke to him about the policy?

A. The fire insurance policy on this business, that is right.

Q. Then was it reissued at a subsequent date?

A. This policy was issued in lieu of the other policy.

Q. When? A. In April 1944.

Q. How did you happen to reissue it in lieu of the other one?

A. Because the other company didn't want to carry the risk.

Q. Did you have any discussions with Mr. Himmelfarb as to issuing this policy in lieu of the other one?

A. Well, I simply told him that the company didn't want to carry that risk.

The Court: No, did you have a discussion?

The Witness: Yes, I did.

Q. (By Mr. Strong): Did you issue this policy with the same insured as the one in lieu of which you were issuing it?

A. That is right, I did. [766]

Q. I call your attention to the insured in this

(Testimony of David L. Gorgerty.)

policy. Will you state whether you had it issued as shown?

A. That policy was issued in the name of Phillip Himmelfarb, doing business as Phillip's Meat Company.

Q. When you reissued it?

A. Well, this policy wasn't reissued, it was the beneficiary that was changed on it by endorsement.

Q. When was that?

The Court: Is the endorsement on the policy?

The Witness: On August 1, 1944.

Q. (By Mr. Strong): Is that endorsement on the policy? A. It is.

Q. It is right in front of you on Government's Exhibit 44 for identification? A. Yes, sir.

Q. And you changed the beneficiary from what to what? A. From Phillip Himmelfarb——

Mr. Katz: Just a moment. That is objected to. There isn't any foundation for that.

The Court: There is no foundation for that question.

Q. (By Mr. Strong): Did you have any discussions with the defendant Phillip Himmelfarb as to change of beneficiary? A. Yes. [767]

Mr. Katz: Objected to as leading and suggestive.

The Court: It is answered. Go ahead.

Q. (By Mr. Strong): About when?

A. Sometime previous to August 1st, 1944.

Q. Approximately when?

A. It must have been sometime in July.

(Testimony of David L. Gorgerty.)

Q. Where was it?

A. At the plant where Phillip was operating.

Q. Who is Phillip?

A. Phillip Himmelfarb, at 3301 East Vernon Street.

Q. Who was present?

A. Phillip Himmelfarb and Sam Ormont.

Q. Will you state what was said by either Phillip Himmelfarb or Sam Ormont in that conversation as to the beneficiary?

Mr. Katz: Objected to as no proper foundation laid, incompetent, irrelevant and immaterial, not within the issues of this case.

Mr. Robnett: I join in that objection for Mr. Ormont.

The Court: Overruled as to both defendants.

Q. (By Mr. Strong): State what you said.

A. At the address that I mentioned, Mr. Himmelfarb introduced me to Sam Ormont and said, "Dave, this is my partner, [768] and I want to change the fire insurance on our stock so it covers myself and Sam doing business as the Acme Meat Company." And I wrote the instructions down——

Q. Is that the end of the conversation?

A. Oh, we might have talked about other things while we were there.

Q. Then did you subsequently have prepared the change of beneficiary. A. I did not.

Q. Will you look at the form, Standard Forms Bureau Form 446, which is attached to the front page of Government's Exhibit 44 for identification.

(Testimony of David L. Gorgerty.)

Did you have that issued pursuant to that conversation? A. I did.

Q. Where is the original of that policy?

A. In the hands of Phillip Himmelfarb and Sam Ormont, as far as I know. It was delivered to them.

Mr. Strong: I offer this document in evidence, your Honor.

The Court: That is a true and correct copy of it?

The Witness: Yes, your Honor, it is.

Mr. Robnett: I move to strike out the witness' answer as a conclusion of the witness. He says as far as he knows.

Mr. Strong: He said he delivered it to them.

The Witness: I said I delivered it to them.

Mr. Robnett: He said as far as he knows he delivered it to them.

The Witness: I delivered it to them, if that will make it more specific to you.

The Court: The motion is denied.

Mr. Strong: I offer Government Exhibit 44 for identification in evidence.

The Court: Admitted.

(The document referred to was received in evidence and marked Government's Exhibit No. 44.)

Q. (By Mr. Strong): I show you Government's Exhibit 45 for identification and will you state what that is, if you know?

A. Monthly reports of values.

(Testimony of David L. Gorgerty.)

The Court: Are there several?

The Witness: There are five.

Q. (By Mr. Strong): Will you state what months they are?

A. From May 3, 1944 to June 3, 1944, and June 3, 1944 to July 3, 1944, July 3, 1944 to August 3, 1944, and August 3, 1944 to September 3, 1944, September 3, 1944 to October 3, 1944.

Q. Have they any relation to the policy, Government's Exhibit 44?

A. These are reports that are made on what we call a [770] monthly reporting form——

Mr. Robnett: I object to the question as asking for a conclusion of the witness, that they are related to it.

The Court: Yes. Objection sustained.

Q. (By Mr. Strong): Will you state what those are with reference to Government's Exhibit 44?

A. Government's Exhibit 44 is what we call a monthly reporting fire insurance policy on which the beneficiary reports monthly the amount of merchandise and stock on hand for premium computation purposes.

Q. What is Government's Exhibit 45 for identification, if you know?

A. It is the monthly reports that were made showing the values of merchandise and stock on hand that was insured under the policy as I described in Exhibit 44.

(Testimony of David L. Gorgerty.)

Q. For what company?

A. The Acme Meat Company.

Q. Are you acquainted with the signature of the defendant Phillip Himmelfarb? A. I am.

Q. Have you seen him sign it in your presence?

A. Yes, sir.

Q. Would you examine those four or five pages which constitute Government's Exhibit 45 for identification and [771] state whether that is the signature of Phillip Himmelfarb. A. Yes, sir.

Mr. Strong: I offer Government's Exhibit 45 for identification in evidence.

Mr. Robnett: I would like to be able to see them. I have never seen them, your Honor.

The Court: Haven't you seen either one of the documents?

Mr. Robnett: No, I haven't seen them. Counsel said he wasn't offering them against my client, but it developed his name came into it. I would like to see them before the ruling is made.

Mr. Strong: I am sorry. I thought I had shown it to him but I guess I hadn't.

The Court: On the insurance policy you can make your basis for a motion to strike.

On Exhibit 45, were those received by you?

The Witness: I made them out and Himmelfarb signed them and gave me the information that was on them and I filled them in and sent them in to the company.

The Court: You sent them to the company?

The Witness: That is right.

(Testimony of David L. Gorgerty.)

The Court: On or about the date each one of them bears?

The Witness: That is right.

Mr. Robnett: If the Court please, on behalf of Sam Ormont, as to the offer of Exhibit 45 for identification, I [772] wish to make this objection to the first page thereof—there are several pages, your Honor—the first page, on the ground that it is incompetent, irrelevant and immaterial, hearsay testimony as to my client Sam Ormont, as it shows on the face of it that it was issued to Phillip Himelfarb, doing business as Phillip's Meat Company. Then is written afterwards in pen and ink—that has not been proven, no foundation laid to show who wrote it—Acme Meat Company. It does not purport to be any document against Sam Ormont.

The Court: I think your objection is good as to those documents which bear a date prior to the date of this conversation that he identified. When was it, August? When was it that the two of them were present?

The Witness: When the two were present?

The Court: When the rider was made?

The Witness: Yes, they told me before the rider was made——

The Court: No, no. When was it?

The Witness: Before the rider was made they told me——

The Court: I know, but when was it? Was it August?

(Testimony of David L. Gorgerty.)

The Witness: Sometime before the 1st of August.

The Court: All right. That is all I wanted to know.

Mr. Robnett: I wish to object to each and every page of this offer of Exhibit 45 on the ground that it is incompetent, irrelevant and immaterial, hearsay testimony, not binding upon [773] Mr. Ormont and no proof or any foundation for the admission as against Mr. Ormont.

The Court: Let me see the document.

(The documents referred to were passed to the Court.)

Mr. Katz: Before your Honor rules I would like to examine the witness on voir dire with respect to these documents.

Mr. Strong: May I say something, your Honor?

The Court: Just a moment.

Mr. Witness, the signature Phillip Himmelfarb there is Phillip Himmelfarb?

The Witness: That is right.

The Court: And Acme Meat Company, you wrote that?

The Witness: That is my writing.

The Court: And you wrote Acme Meat Company up here?

The Witness: I did. That is when the change was made.

The Court: June 3, 1944?

The Witness: That is right.

(Testimony of David L. Gorgerty.)

The Court: This was before the change was made, was it not?

The Witness: No, when they told me to do this then I turned in these reports to the company showing that the change had been made and the indorsement was issued afterwards.

Mr. Strong: May I call this to your Honor's attention, Government's Exhibit 44 shows that the indorsement making the change is dated May 20, 1944? [774]

The Court: May 20th?

Mr. Strong: Yes, your Honor.

The Court: And the conversation was not until August?

The Witness: No, the conversation was sometime prior to August when the transfer was made over to the Acme Meat Company. And whatever this indorsement shows here is the time that the conversation was had when they told me to change it to the Acme Meat Company.

The Court: That is, May 20, 1944?

The Witness: That is right.

The Court: Then it wasn't August?

The Witness: This other indorsement is dated August and I said sometime prior to August. This is dated in May.

The Court: If this was dated in May, that is when you had your conversation with the two of them?

The Witness: That is right, just a few days

(Testimony of David L. Gorgerty.)

before that, and then I notified the company and in due course I got the indorsement.

The Court: The objections are overruled. I think that on voir dire, I do not believe you would be entitled to examine at this time, but you may reserve that for cross examination.

Mr. Strong: That is as to 44 and 45, your Honor?

Mr. Robnett: I haven't seen 44. He offered the other [775] one first.

The Court: I have already admitted Exhibit 44 but you may make a motion to strike. You may state your grounds for the record.

Mr. Robnett: I object to the introduction of Exhibit 44 and I would like to have my objection precede the ruling of the Court.

The Court: You may state it and it will be stated as a basis for a motion to strike.

Mr. Robnett: Thank you.

I object to it as incompetent, irrelevant and immaterial, hearsay as to Sam Ormont, and not binding upon him in any manner, shape or form, there is no foundation laid to show that he authorized any changes or had anything to do with this document, and that his name did not appear therein excepting someone has put it in in pencil on the face of it, and that the rider dated May 20, 1944 is merely typewritten and is not signed by anyone and therefore would not be binding upon anybody, even the company that wrote the policy.

The Court: That is the copy.

(Testimony of David L. Gorgerty.)

Mr. Robnett: Oh, this is the copy?

The Court: Yes; that is the copy. He testified that the original was delivered to Himmelfarb, the other defendant.

Mr. Robnett: As I said, there is no foundation laid to introduce this instrument against Mr. Ormont as proof of any of the issues of this case, and in addition that it contains [776] considerable amount of hearsay on the back thereof as it contains five purported letters between——

Mr. Strong: I am not offering the letters. I will take them off.

Mr. Robnett: They are on it. There is a lot of correspondence between parties that are not parties to this action, and there is no foundation that Mr. Ormont knew them or anything about them.

The Court: Were those part of the policy or are those just letters?

The Witness: No, these letters were not part of the policy.

The Court: Very well.

Mr. Strong: May I physically remove them? May I have the witness state what is part of the policy so I can tear off the documents that are not part of the policy?

The Court: Very well.

Q. (By Mr. Strong): Just show me what is or what is not part of the policy.

A. (Examining documents.)

Mr. Strong: I am physically removing all of the papers which the witness has indicated are not part

(Testimony of David L. Gorgerty.)

of the policy and I am not offering them as part of Government's Exhibit 44.

The Court: They may remain marked for identification, [777] however, in case any of the parties want to have recourse to them as 44-A.

(The document referred to was marked Government's Exhibit No. 44-A for identification.)

Mr. Robnett: I would like the privilege of asking the witness one or two questions, your Honor, before ruling on my objection.

The Court: I think sufficient foundation has been laid to admit the documents.

Mr. Robnett: That is the point I wanted to ask him. He has testified that he delivered a policy to the two defendants, the two individuals.

The Court: He testified that he had a conversation with Phillip Himmelfarb and Sam Ormont and they told him they wanted him to change this policy from Phillip's Meat Company to the Aeme Meat Company, that he said, "Meet my partner, Mr. Ormont," and then he delivered the original, of which this copy is a copy, of the policy to Phillip Himmelfarb in accordance with that conversation. So what more is there needed?

Mr. Robnett: My understanding of the testimony of the witness, your Honor—if I am wrong why I am sorry—was that Mr. Himmelfarb made a statement, that he has not testified that Mr. Sam Ormont made any statement whatsoever about the partnership, that Mr. Himmelfarb made the state-

(Testimony of David L. Gorgerty.)

ment. He also testified, as I recall, that he delivered the original [778] policy to Mr. Himmelfarb and Mr. Ormont. Now I want to find out from him as to which one he delivered it to or whether he handed it to the two of them at once, what he means by that. I think it is his conclusion as to delivering it to the two of them.

The Court: I think you can cover that on cross-examination. The documents are admitted in evidence. If any testimony develops as a basis for a motion to strike, I will give it consideration.

(The document referred to was received in evidence and marked Government's Exhibit No. 45.)

Mr. Strong: That is all the questions I have.

The Court: Cross examine. Mr. Katz?

Cross-Examination

By Mr. Katz:

Q. Mr. Gorgerty, I believe that you have Exhibits 44 and 45 before you.

The Clerk: No, he doesn't.

(The documents referred to were passed to the witness.)

Q. (By Mr. Katz): Exhibit 44 which you now have before you, Mr. Gorgerty, is a copy of a policy that was issued to Phillip Himmelfarb, doing business as Phillip's Meat Company, is that correct?

A. That is correct.

Q. When was that policy first issued as a reis-

(Testimony of David L. Gorgerty.)

suance of [779] another policy previously cancelled?

A. This policy was issued on the 3rd day of April, 1944.

Q. In the manner that you have just stated, namely, to Phillip Himmelfarb doing business as Phillip's Meat Company, is that correct?

A. That is right.

Q. And the policy that was previously cancelled and which this policy was issued in lieu of was likewise issued to Phillip Himmelfarb doing business as Phillip's Meat Company?

A. That is correct.

Q. Now sometime subsequent to May 1st you visited Mr. Himmelfarb at his place of business, is that correct?

A. That is right.

Q. At that time was he still doing business as Phillip's Meat Company? Was that the place that you had called at when he was doing business as Phillip's Meat Company?

A. Yes, sir.

Q. And when you arrived there you were introduced to Mr. Ormont, is that correct?

A. That is correct.

Q. Now upon first coming in I take it that you exchanged greetings with Mr. Himmelfarb, whom you had known? [780]

A. That is right.

Q. Had you known Mr. Ormont previous to that?

A. I had an acquaintance with him, yes. I had been introduced to him and I knew who he was.

Q. You had been introduced to him prior to the time you had come down on this occasion that

(Testimony of David L. Gorgerty.)

you testified that you had a conversation with Mr. Himmelfarb about the transfer of the policy that is Exhibit 44? A. Yes, sir.

Q. Where had you previously met Mr. Ormont?

A. At 3301 East Vernon Street where Himmelfarb was doing business as Phillip's Meat Company.

Q. You had previously met him in that place of business? A. Yes.

Q. Do you recall how long previously you had met Mr. Ormont there?

A. Oh, several months. He was in and out of there.

Q. On this particular occasion when you walked in and after you had exchanged greetings with Mr. Himmelfarb, Mr. Himmelfarb said to you, "I want you to meet Mr. Ormont, my partner"?

A. That is right.

Q. You then said, "Hello," to Mr. Ormont?

A. Certainly. [781]

Q. Did you then discuss matters generally that didn't pertain to this insurance policy?

A. Yes, sir.

Q. You spent some little time discussing general matters? A. That is right.

Q. Then after such general discussion Mr. Himmelfarb told you that the policy that he had and that had been issued to Phillip's Meat Company, he wanted that transferred to Acme Meat Company if it could be done, is that correct?

A. That is correct.

Q. And upon the basis of that statement, that Mr. Himmelfarb told you he wanted it transferred

(Testimony of David L. Gorgerty.)

to Acme Meat Company if it could be done, you proceeded to have the transfer made?

A. That is right.

Q. Now at the 'time that Mr. Himmelfarb told you, introduced you to Mr. Ormont as his partner, did he at that time tell you whether or not Mr. Ormont was his partner in the Acme Meat Company or any other enterprise or enterprises?

A. Will you read that question to me?

(The question referred to was read by the reporter as set forth above.)

The Witness: He told me that he and Mr. Ormont were partners doing business as the Acme Meat Company. [782]

Q. (By Mr. Katz): He told you that at the time he introduced you?

A. Yes, or while we were in conversation immediately afterwards.

Q. And it was in substantially that language, that he and Mr. Ormont were doing business as partners in the Acme Meat Company?

A. That is right.

Q. And you made a note of that fact in order to have the insurance policy so issued?

A. I wrote it down on a memorandum so that I would have it issued as they had directed.

Q. And in order to have it issued properly and correctly you made a notation as to the name of Mr. Ormont and a spelling thereof? A. Yes, sir.

Q. And was the policy issued as you had noted that name?

(Testimony of David L. Gorgerty.)

A. The indorsement is issued "A-r-m-o-n-t."

Q. Was that the way that you had noted the name?

A. Probably not. I think his name starts with "O."

Q. You say probably not. Do you recall whether you did or did not note the name?

A. I know enough about my writing to know that my "O's" and "A's" are very often mistaken.

The Court: By you?

The Witness: Sometimes.

Q. (By Mr. Katz): Well, now, I will call your attention to the name Sam Armont and the symbol for and appearing on the copy, Exhibit 44, and I will ask you whether or not that is your writing.

A. No.

Q. Do you know whose writing that is?

A. I haven't any idea. Probably an underwriter in the office that wrote the policy.

Q. That wasn't made by you? A. No, sir.

Q. You will note that the "A" there is a printed type of an A? A. That is right.

Q. Where did you make your notation, Mr. Gorgerty, with respect to how or in what names the policy was to be issued?

A. I made it on a slip of paper that I had in my pocket or a notebook that I might have carried.

Q. You presented the slip of paper with the names on it as you had written it to the underwriter that issued the policy?

A. I think I didn't; I think I telephoned it. [784]

(Testimony of David L. Gorgerty.)

Q. Mr. Gorgerty, do you recall whether or not the original request that the policy be transferred from Phillip Himmelfarb to the Acme Meat Company was one that came to you by way of telephone?

A. Well, Phillip might have told me over the phone and then I went to the place of business and wrote down the information there because I recall talking with he and Ormont at the time and before that time Phillip told me that he thought he would go in partnership with Ormont. [785]

Mr. Katz: I move to strike that, if the Court please.

Mr. Strong: No, I think that is very important.

The Witness: —that he had a packing plant at Southgate—

The Court: Wait.

The Witness: Excuse me.

The Court: Motion denied.

Q. (By Mr. Katz): Will you take a look at Exhibit 45, that is before you, Mr. Gorgerty. Did you fill this out?

Mr. Strong: Your Honor, I think that is a little confusing. There are number of documents, and various things on it.

The Court: I don't think it is confusing. He has been there.

Mr. Strong: It is confusing me, I should have said.

The Court: The question is, did you fill them out?

(Testimony of David L. Gorgerty.)

The Witness: If you mean I entered in the figures, I did.

The Court: The other writing—they are blank forms filled in with typewriting and pen and ink, did you do any or all of it?

The Witness: I filled in the figures that I inserted with a pen, and I believe that I had the forms typed so that they could be filled in.

Q. (By Mr. Katz): It is true, isn't it, that the typewriting that appears on each page of these exhibits were typed in by you, or [786] someone at your office? A. Probably so, yes.

Q. You know that to be undoubtedly so, don't you?

A. I know that Himmelfarb or Ormont did not type them in, if that is what you want to know.

Q. And they were typed in by you or——

A. At my request.

Q. Someone at your request?

A. That's right.

Q. At your office? A. That's right.

Q. In addition to typing the first page, I will call your attention to the writing "Acme Meat Company" that appears on the line following the typing "Phillip Himmelfarb d.b.a." doing business as "Phillip's Meat Company," and ask you whether the writing "Acme Meat Company" is in your handwriting? A. It is.

Q. I want now to call your attention to the figures in the column and on the line opposite the words and figures: 1 Cal. 301 East Vernon, \$3,000.00.

(Testimony of David L. Gorgerty.)

I will ask you if you wrote that in. A. I did.

The Court: One what, a cow?

Mr. Katz: C-a-l, an abbreviation for California.

The Court: I thought you said one cow. [787]

Mr. Katz: No, your Honor.

Q. I will call your attention to the date, June 3, 1944, and I will ask you whether or not that is in your handwriting. A. It is.

Q. And I will call your attention to the words "Acme Meat Company" appearing above the signature "Phillip Himmelfarb" and ask you if you wrote that in? A. I did.

Q. And isn't it true that everything upon the page that I have just shown you, other than the signature, was typed in or written in by you?

The Court: He just said it was.

Mr. Katz: I just wanted to cover it all, so there will be no question that there is nothing else on there that I have not referred to, your Honor.

The Court: Awhile ago you asked him if everything—everything means everything.

Mr. Katz: If I have covered it, that's fine.

Q. Isn't it also true that the statement, and all the other pages constituting Exhibit 45, were signed by Mr. Himmelfarb in blank, delivered to you, and you filled out whatever appears on it? A. No.

Q. Let us go back now to the first one. Is it true with respect to the first one? [788]

A. That's right.

Q. I call your attention to the second page. Is it likewise true that all the typing on that page was

(Testimony of David L. Gorgerty.)

done by you, or someone at your request, in your office?

A. That's right.

Q. I will call your attention——

The Court: All the handwriting except the words "Phillip Himmelfarb"?

The Witness: I signed the name "Himmelfarb" to it, Judge.

The Court: On the second one?

The Witness: Yes, sir, and on the third, and on the fourth one, and on the fifth one.

The Court: In other words, you filled in the second, third and fourth and fifth completely?

The Witness: That's right.

The Court: Entirely?

The Witness: That's right.

The Court: And signed it in typewriting or in ink or pencil, or whatever it is?

The Witness: That is correct.

Q. (By Mr. Katz): Do you know that the first page bears the signature of Mr. Phillip Himmelfarb?

A. That is correct.

Q. Except for that signature everything else was filled [789] in by you?

A. That's right.

Q. On all of the others, except the first page, everything that is filled in by you, including the signature of Mr. Himmelfarb?

A. That's right.

Q. Isn't it true that what was actually done, there was telephoned in to you the amount, which you inserted in figures on these exhibits, and proceeded to get them up and sign them?

(Testimony of David L. Gorgerty.)

A. Some of them, the figures were phoned in, and some of them I got at the plant.

Q. Irrespective of whether they were phoned in, or whether you got them at the plant, you filled in all of the Exhibit 45 save and except the signature on the first page? A. That's right.

Q. At your office, did you not?

A. That's right.

Q. Isn't it true that the defendant, Phillip Himmelfarb never saw the last four of the five sheets that constitute Exhibit 45? A. That's right.

Q. And isn't it true that when he did see the first page of Exhibit 45, it was in blank, and signed it that way?

A. Yes, when he first saw it it was in blank, and he had signed it that way. [790]

Q. And you took the blank document, signed by him, to your office, and had it filled in?

A. No, let's get this straight now. I had all of this typed, and I took them down, and Phillip signed them.

The Court: Signed what?

The Witness: These reports in blank. He signed enough of them for twelve month's reports.

The Court: Yes.

The Witness: Then when they changed over to the Acme Meat Company, the first one, that was the last one of the Phillip's Meat Company.

The Court: Which is the first sheet of that?

The Witness: Which is the first sheet of that.

The Court: Which the last time you saw it,

(Testimony of David L. Gorgerty.)

it was in blank before you filled it out?

The Witness: It had this writing, but it did not have any amount filled in.

The Court: Not the words "Acme Meat Company?"

The Witness: No, Acme Meat Company was not on the bottom of it at that time.

Q. (By Mr. Katz): Now, Mr. Gorgerty, isn't it a fact that the first page of Exhibit 45 was one of the twelve statements signed in blank by the defendant Himmelfarb in connection with the policy issued to Phillip Himmelfarb doing business as Phillip's Meat [791] Company?

A. That's right.

The Court: He just said that.

Mr. Katz: And after the first one was filed, you did not use the rest of the twelve statements he had signed in blank, but proceeded to sign the statements for him in connection with the change of policy?

A. That's right.

Mr. Katz: If the court please, on the basis of the testimony elicited by this witness, I move to strike that document from evidence, which was the purpose of my request for voir dire, to establish that the Exhibit 45 was never seen by the defendant, never written by the defendant, and never made by him.

Mr. Strong: May I ask one or two questions.

The Court: Yes.

Q. (By Mr. Strong): Those pages which are Government's Exhibit 45, are they the originals, or

(Testimony of David L. Gorgerty.)

carbon copies? A. They are the originals.

Q. Will you state how you happened to sign Phillip Himmelfarb's name where you said you had signed it?

Mr. Robnett: I object to this as hearsay testimony, if the Court please, against Mr. Ormont.

Mr. Katz: I object, as calling for the conclusion of the [792] witness, incompetent, irrelevant and immaterial.

The Court: Yes. This is, I think, a good time to have a recess. Remember the admonition.

(Short recess.) [793]

The Court: The usual stipulation?

Mr. Strong: So stipulated.

Mr. Katz: Yes.

Mr. Robnett: So stipulated.

The Court: Your motion was to strike Exhibit 45?

Mr. Katz: Yes, your Honor.

The Court: Do you have something to say?

Mr. Strong: Something to say, or something to ask him?

The Court: You have further questions?

Mr. Strong: Yes.

The Court: Proceed.

Q. (By Mr. Strong): Did you have any conversation with the defendant Himmelfarb as to signing any documents on his behalf?

A. Yes, sir.

Q. When was that?

(Testimony of David L. Gorgerty.)

A. About the time we started in with the Acme Meat Company. I had made out these reports for the Phillips Meat Company——

Mr. Robnett: I move to strike out that he made out the reports, as not responsive. He has already answered the question.

The Court: He answered yes, he did have a conversation.

The Witness: Yes. [794]

Q. (By Mr. Strong): Who was present?

A. Phillip Himmelfarb and Ormont.

Q. Where was the conversation?

A. At the plant.

The Court: Is this the same conversation that you referred to before?

The Witness: I think it was in the same conversation. If not, it was in the next week or so, but it was a part of the same transaction.

The Court: The same parties present?

The Witness: Yes.

Q. (By Mr. Strong): What was said?

Mr. Katz: Objected to as incompetent, irrelevant and immaterial, and having no bearing upon the issues in this case, if the Court please.

The Court: Overruled.

Mr. Strong: Go ahead.

A. Phillip said: Go ahead and sign my reports, and send them in, because we are too busy down here.

Q. Who is Phillip? A. Himmelfarb.

Mr. Strong: That is all.

(Testimony of David L. Gorgerty.)

Q. (By Mr. Katz): The conversation that you have just referred to was [795] before the policy was changed and transferred over from Phillip's Meat Company to the Acme Meat Company, was it not? A. No, sir.

Q. Was it after that time?

A. Yes, sir, Himmelfarb had signed all of the blanks for the policy, while he was doing business as Phillip's Meat Company.

Q. He had signed twelve of those blanks?

A. Yes.

Q. In connection with the other policy?

A. That's right, in connection with this policy.

Q. In connection with this policy, prior to the transfer of it from the Phillips Meat Company to the Acme Meat Company? A. That's right.

Q. The conversation that you had with Mr. Phillip Himmelfarb, at which you stated Mr. Ormont was present, was prior to the time that the policy was transferred and changed over, wasn't it?

A. We had a conversation prior to the time it was changed over, yes, sir, and several conversations after it was changed over.

The Court: No, the conversation that you referred to is the one he is talking about, where he told you to go ahead and sign the reports, was that before or after the change of policy?

The Witness: It was after the change of policy. Otherwise, I would not have signed it, if they were all signed by Himmelfarb.

Mr. Katz: I object, if the Court please, as not

(Testimony of David L. Gorgerty.)

responsive, and calling for the opinion of the witness.

The Court: It may be stricken, and the jury instructed to disregard his answer after the word "otherwise."

Q. (By Mr. Katz): Will you take a look at the policy, Exhibit 44, and please tell us what the date is that that policy was transferred and changed over from the Phillips Meat Company to the Acme Meat Company? A. May 20, 1944.

Q. Also tell us on what date it was that you had this conversation that you have referred to, with the defendant Phillip Himmelfarb, at which you stated Mr. Ormont was present?

A. A few days prior to May 20th.

Q. A few days prior to May 20th?

A. Yes.

Q. I will now ask you if it is not true that that conversation took place before that policy was changed and transferred over from the Phillip's Meat Company to the Acme Meat Company?

Mr. Strong: I object to that. There are several conversations. Just to say "that conversation" does not identify it. We are speaking of where certain statements were made. [797]

The Court: That is what he is talking about. I think the witness knows that.

The Witness: Please read the question.

(Question read by the reporter.)

The Court: By "that conversation" you mean the conversation alluded to, where Himmelfarb told him to fill out his reports?

(Testimony of David L. Gorgerty.)

Mr. Katz: That's right, your Honor, precisely.

The Witness: Himmelfarb told me to sign his name to the reports.

Q. That was not the question.

A. The conversation in which Himmelfarb told me to sign the reports?

Q. Yes.

A. Was after the policy was transferred over to the Acme Meat Company.

Q. On what date was it that you had this conversation that you have just referred to?

A. I would not know any more than you would what date you went fishing or skating last year.

The Court: That is a conclusion of the witness. Moreover it assumes it assumes a fact not in evidence.

The Witness: He didn't catch any fish anyway.

Mr. Strong: There is no skating in California, your Honor.

The Court: Oh, yes. [798]

Mr. Strong: Outdoors.

Mr. Katz: Didn't you testify just a few minutes ago that the conversation took place prior to May 20?

Mr. Strong: Your Honor, that has already been asked and answered.

The Court: I think that is argumentative. [799]

Q. (By Mr. Katz): You had a conversation with Mr. Phillip Himmelfarb before the policy was transferred, did you not? A. Certainly.

Q. Do you recall how long before the policy was transferred that you had that conversation?

(Testimony of David L. Gorgerty.)

A. Well, it was immediately before.

Q. When you say "immediately" does that refer to days or weeks or hours?

A. Well, this policy was transferred——

The Court: No, no.

The Witness: May I explain, Judge, how these transactions are handled?

The Court: I think you have explained that.

The Witness: Will you please read the question again?

(The question referred to was read by the reporter as follows:

("Q. When you say 'immediately' does that refer to days or weeks or hours?")

The Witness: A day or so before the indorsement.

Q. (By Mr. Katz): When did you next see Mr. Phillip Himmelfarb again?

A. When I took the indorsement over to him, changing it from the Phillip's Meat Company to the Acme Meat Company.

Q. How long was that after May 20th? [800]

A. Probably four or five days.

The Court: Who was present then?

The Witness: Ormont and Phil were there nearly every time I went there.

The Court: Were they there at that time?

The Witness: I would say they were.

(Testimony of David L. Gorgerty.)

Q. (By Mr. Katz): Do you recall whether they were there on that occasion?

A. I don't recall of very many occasions where they were not there.

The Court: Strike the answer. Read the question again.

(The question referred to was read by the reporter as follows:

("Q. Do you recall whether they were there on that occasion?")

The Witness: I would say they were.

Q. (By Mr. Katz): Is that based upon your recollection of the fact or because you know them to be there on most occasions that you went there?

A. Well, they were there most of the time.

Q. That is the reason you made the statement?

A. I would say that they were there that day.

Q. Now with reference to the matter of the statements, [801] wasn't that taken up by you with Mr. Himmelfarb at the time that you first discussed with him the matter of the indorsement and transfer over of this policy?

A. I think I just answered that question.

Q. I don't recall having asked it so may we have an answer to it?

The Court: Yes.

The Witness: Will you read the question?

(The question referred to was read by the reporter as follows:

("Q. Now with reference to the matter of

(Testimony of David L. Gorgerty.)

the statements, wasn't that taken up by you with Mr. Himmelfarb at the time when you first discussed with him the matter of the indorsement and transfer over of this policy?")

Mr. Strong: Well, your Honor, I think that has been gone into time and again. I object to it.

The Court: Objection overruled.

The Witness: It was taken up with him at the time and again after the policy was transferred over.

Q. (By Mr. Katz): He talked about that on more than one occasion? A. That is right.

Q. Now you personally took the indorsement to Mr. Phillip Himmelfarb? [802] A. Yes, sir.

Q. You personally delivered the policy after it was changed over?

A. They had the policy. I never got it back. All I took was the indorsement changing it over.

Q. Mr. Gorgerty, I will ask you to look at Exhibit 44 and please state whether or not the original of the policy has the words that are written in on this copy, the symbol and, Sam Ormont, that appear between the words Phillip Himmelfarb and the letters dba, a line through Phillip's Meat Company and the words Acme Meat Company?

Mr. Strong: Objected to because the witness indicated he didn't have the original policy.

The Court: Objection overruled.

The Witness: Will you repeat the question?

(The question referred to was read by the reporter as set forth above.)

(Testimony of David L. Gorgerty.)

The Witness: I would say that the original policy does not have that typed in there.

Q. (By Mr. Katz): Now, Mr. Gorgerty, were you mistaken when you told the Court, in response to a question the Court asked you, that this was a true copy of the original?

A. It is, it is, but I am going to explain to the Court that you are trying to twist the witness——

Mr. Katz: Well, that isn't—just a moment.

The Witness: That what you are referring to——

Mr. Katz: If the Court please, I do not believe that is a fair and proper and accurate statement.

The Court: No, it is not, Mr. Witness. The jury are instructed to disregard the witness' comment.

The Witness: What you have here——

The Court: Do not try to see what he is trying to do to you, just see whether you can answer the question.

The Witness: I can take care of myself, Judge.

What you are referring to here is the underwriter's notation.

The Court: Do you want to make an explanation of your answer, that you said it was a true copy of the original?

The Witness: That is right. This is a true copy of the original except that the underwriter has made some notations on this which are not included on the original policy, and Sam Ormont, and the line drawn through Acme Meat and the

(Testimony of David L. Gorgerty.)

Acme Meat which is typed in here with a pencil were not on the original policy.

Q. (By Mr. Katz): And so far as you know still are not on the original policy?

A. That is right.

Q. And it is true, is it not, that that policy that you [804] have there with the words and figures on it, whether written in typewriting or printed is not an exact or true or correct copy of the original?

A. In answer to that question, this is a true copy of the original which was delivered in this transaction except for the part that is above the amount of \$10,000, which is underwriting information only, and not on the original policy, and the penciled letters of Sam Ormont and the sign and a pencil line through the Phillip's Meat Company and Acme Meat Company by pencil. This is a true copy with that exception, including the indorsements that are attached to the policy.

Q. Mr. Witness, if this copy were different and unlike the original then it would not be a true copy of the original, is that correct?

The Court: That is argumentative.

Mr. Katz: Yes, your Honor. I submit that it is.

Q. The original policy does not read Phillip Himmelfarb and Sam Ormont dba Acme Meat Company, does it?

The Court: He just got through answering that question.

Mr. Katz: I will withdraw it, your Honor.

Q. You didn't deliver the original of that policy to Himmelfarb and Sam Ormont, did you?

(Testimony of David L. Gorgerty.)

A. I delivered it to Phillip Himmelfarb.

Q. When [805]

A. A few days after the third of April, 1944.

Q. Were you mistaken when, in response to a question that Mr. Strong put to you, you stated that the policy was delivered by you to Mr. Himmelfarb and Mr. Ormont?

A. I didn't make that statement.

Mr. Strong: Objected to, your Honor. The witness didn't so testify. There are different deliveries and it isn't clear from the questions which one counsel means.

The Court: I understood that the witness had testified to that but I think it has been straightened out since. He delivered the rider.

The Witness: That is right.

Mr. Strong: Yes.

Q. (By Mr. Katz): You didn't mean to state that you delivered the policy to Mr. Himmelfarb and Mr. Ormont?

A. No, I never delivered the policy to Himmelfarb and Ormont, I delivered it to Himmelfarb. I delivered the rider to Ormont and Himmelfarb when it was changed over to the Acme Meat Company.

Q. Where did you deliver that rider?

A. 3301 East Vernon Street, in Vernon, California.

Q. Who was present at that time?

A. Ormont and Himmelfarb.

Q. Was anyone else present? [806]

(Testimony of David L. Gorgerty.)

A. Not that I recall of. There was a Captain Blackman there a few times when I called on business affairs.

Q. When you delivered that indorsement, how did you deliver it?

A. Just like you deliver a letter, you hand it to a fellow and say, here it is. It was in an envelope.

Q. Who did you hand it to?

A. That is right.

Q. I say, who did you hand it to?

A. To Phillip Himmelfarb.

Q. To Phillip Himmelfarb?

A. That is right.

Q. And that was what you meant when you said you delivered it to both of them, is that you handed it to——

A. They were both there and they discussed the matter while we were there.

Q. Was anyone else present at any of these conversations that you had other than yourself and Mr. Ormont and Mr. Himmelfarb?

A. I don't believe there was. The office was pretty small and there wasn't room in there for more than two or three people.

Q. Not at any time? A. No.

Q. What about this Captain Blackman? [807]

A. Captain Blackman I saw two or three times and was introduced to him.

Q. Did he participate or was he present at these conversations?

A. No, he was not. I didn't see Blackman after

(Testimony of David L. Gorgerty.)

Phillip tied up with the Acme Meat Company.

Q. Now, 3301 Vernon Avenue was occupied by companies in the meat business, or persons in the meat business, other than the Phillips Meat Company and the Acme Meat Company, is that correct?

A. Yes, there are I think several other companies doing business at the same location. It is a refrigeration and packing plant.

Q. And on these occasions that you went there to make the deliveries, there were other companies there doing business there?

A. Well, may I explain that this is a large warehouse in which a lot of meat distributing men use space for storage and cooling purposes. The part that was occupied by Phillip Himmelfarb and Sam Ormont was an office about——

The Court: He didn't ask you about that. He just wanted to know if there were others there.

Q. (By Mr. Katz): Do you recall any of the others there at that time? A. No. [808]

Q. You don't recall any of them? A. No.

The Court: What difference does that make?

Mr. Katz: I am trying to find out if this man got into the right office.

Mr. Strong: He identified the defendants, your Honor.

Mr. Katz: Now, if the Court please, I will renew my motion to strike Exhibit 45 and I will also move to strike Exhibit 44. My motion as to Exhibit 44 is predicated upon the fact that that copy was received in evidence upon the testimony that it was a true

(Testimony of David L. Gorgerty.)

copy of the original, which in fact it is not and as it has so been established, and Exhibit 45 on the ground that there was no foundation whatsoever for its admission, those documents and everything on there having been filled in and signed, other than the one that was entirely filled in and signed in blank and never seen by the defendant Phillip Himmelfarb.

The Court: The motion is denied. The jury will disregard the pencil writing on Exhibit No. 44 in accordance with the witness' testimony.

Did you have cross examination of this witness Mr. Robnett?

Mr. Robnett: I wish at this time, if your Honor please, on behalf of Mr. Ormont to move to strike all of Exhibit 45, I believe it is—if I am not mistaken, that is the one of [809] several pages, not the policy—on the ground that it is incompetent, irrelevant and immaterial as to this defendant and there is no proper foundation for its original admission and it should be stricken from the record as to him. It was not authorized by him, he didn't sign any of it and it was not signed by Mr. Himmelfarb excepting as the evidence shows the first page was signed in blank but that the Acme Meat Company was put on there afterwards by this witness, and as to the extra pages than the first page, they weren't even signed, and this witness signed them.

The Court: I think all that goes to the weight which the jury can give to the evidence rather than its admissibility. There is sufficient evidence in to

(Testimony of David L. Gorgerty.)

support allowing it in evidence. The motion to strike will be denied.

Mr. Robnett: I wanted one other point on that, your Honor.

The Court: I am sorry.

Mr. Robnett: The witness testified subsequent to the admission that Mr. Ormont told him, "You go ahead and fill out my reports," in the singular, and I submit that that was not binding upon Mr. Ormont. Mr. Ormont was not called upon, he wasn't even there and heard to say anything because it wasn't referring to any so-called partnership reports at all, yet these reports are filled out as Acme Meat Company.

The Court: I think that sufficient foundation to admit [810] it is in the record. It all goes to the weight of the testimony.

Do you have any further examination of this witness?

Mr. Robnett: No, I have no questions.

The Court: The witness may be excused.

(Witness excused.)

The Court: Next witness.

Mr. Strong: May I fill out his voucher?

The Court: We can be starting to swear in another witness while you are doing that.

Mr. Strong: Mr. Eustice. He has been sworn.

The Court: I thought you had more witnesses.

Mr. Strong: I don't think it is necessary to have more.

The Court: All right, Mr. Eustice.

J. BRYANT EUSTICE

resumed the stand and testified further as follows:

The Court: You are proceeding now further with the direct examination of this witness as to the defendant Phillip Himmelfarb?

Mr. Strong: Yes, your Honor.

Mr. Robnett: Not as to Mr. Ormont?

The Court: Not as redirect to Ormont?

Mr. Strong: Not on redirect as to Ormont.

The Court: Very well. [811]

Direct Examination

(Continued)

By Mr. Strong:

Q. Now, Mr. Eustice——

The Court: Pardon me, Mr. Strong. Do you wish at this time to consider having made the offer of proof which you made out of the presence of the jury?

Mr. Strong: Yes, your Honor.

The Court: The offer of proof will be rejected on the grounds I indicated at that time.

Mr. Strong: Yes, your Honor.

Q. In connection with your investigation, Mr. Eustice, into the income tax and the income reported by the defendant Phillip Himmelfarb for the year 1944, you have testified here that you examined certain books and documents of the Acme Meat Company, is that right?

A. Yes, sir, that is correct.

Q. When did this examination take place?

Mr. Katz: Objected to, if the Court please. This

(Testimony of J. Bryant Eustice.)

matter has been asked and answered and it is encompassed within the offer of proof that has been rejected by the Court.

The Court: I do not know that it is encompassed within that. And if he said when the examination took place, I have forgotten it. The objection is overruled.

The Witness: Is that the examination of the books and records of the Acme Meat Company?

The Court: With relation to the defendant Phillip Himmelfarb. Isn't that right?

Mr. Strong: Yes. This is only as to Phillip Himmelfarb.

The Witness: That would be about the latter part of November 1944. [813]

Q. Was it on one, or more than one time that you examined these books and records in that respect? A. More than one time.

Q. How many times?

A. I don't know just how many, but several times.

Q. Approximately?

A. Well, the whole examination of the books and records were also taken into consideration in reference to Phillip Himmelfarb. That is, any information that I might find that had any connection with his income. It was not all spent directly on Phillip Himmelfarb.

Mr. Katz: I move to strike that out, if the Court please, as not responsive to the question.

The Court: Motion denied.

(Testimony of J. Bryant Eustice.)

Q. (By Mr. Strong): On the first occasion that you examined the books and records of the Acme Meat Company with reference to the income of Phillip Himmelfarb for the year 1944, where did the examination take place?

A. In the office of the Acme Meat Company.

Q. And who was present?

A. Mr. Phoebus and myself. The bookkeeper of the Acme Meat Company was in the same building.

Q. Who was present with you at the examination? A. Mr. Phoebus. [814]

Q. Where had you obtained the books of the Acme Meat Company on that occasion?

A. At the office of the Acme Meat Company.

Q. Did anyone give them to you?

A. Yes, sir.

Q. Who?

A. Well, the first time I obtained the books, they were given to me by Mr. Berlin, the office manager. Mr. Phoebus had been——

Q. Just what you did.

A. That's what I did, yes, sir.

Q. And did you make a copy of the entries on the records of the Acme Meat Company, on that occasion, with reference to any money paid or received from Mr. Phillip Himmelfarb, or paid to Mr. Phillip Himmelfarb for the year 1944.

Mr. Katz: Objected to, if the Court please, as incompetent, irrelevant and immaterial, having no bearing on any of the issues in this case, and not the best evidence, and hearsay.

(Testimony of J. Bryant Eustice.)

The Court: It calls for a yes or no answer. Did you make any record? The objection will be overruled.

A. What date?

The Court: Read the question.

(Question read by the reporter.)

Mr. Strong: The first occasion that you just got through testifying to. [815]

A. Not on that first day, no, sir.

Q. When did you make a copy of the books and records in that respect?

A. I would say about four weeks later.

Q. Where did that take place?

A. In the office of the Acme Meat Company.

Q. Who was present?

A. Mr. Phoebus and myself.

Q. How did you get the books? Who gave you the books?

A. Well, they were always available after the first time that I went out there; that is, in the office. I just went to the books and went to work on them.

Q. Do you have the entries which you made from those books on that occasion?

A. Yes, sir, I have.

Q. The page you are showing me is a part of Government's Exhibit 40 for identification?

A. Yes, sir, that is correct.

Mr. Strong: Your Honor, it might be simpler if we removed that, and gave it another number, No. 40-A, with your Honor's permission.

(Testimony of J. Bryant Eustice.)

Q. Is that the only page?

A. Just the one page.

The Clerk: We have a 40-A, your Honor.

The Court: 40-B. You said Mr. Berlin was there. The [816] bookkeeper's name is Link, isn't it?

The Witness: The first bookkeeper's name was Link, and Mr. Berlin was bookkeeper at the time I made the audit.

Q. (By Mr. Strong): Looking at Government's Exhibit 40-B for identification, will you state whether that is the transcript which you made of the books and records of the Acme Meat Company, as you just testified? A. Yes, sir, it is.

Q. Do you have the books and records at the present time? A. No, sir.

Q. Where did you last see them?

A. At the office of the Acme Meat Company.

Q. Will you take the income tax return of the defendant, Phillip Himmelfarb, for the year 1944?

A. What number is that, please?

The Court: 4.

A. I haven't got it.

Q. You have it now? A. Yes, sir.

Q. You have already testified as to what books and records you used in connection with your examination of the return for the year 1944, of Himmelfarb, is that right?

A. Yes, sir, I have.

Q. Now, on the basis of the investigation which you made, [817] as you have heretofore testified, did

(Testimony of J. Bryant Eustice.)

you determine whether or not there was any additional income for the defendant Phillip Himmelfarb for the year 1944, over and above that reported on the income tax return of Phillip Himmelfarb for the year 1944?

Mr. Katz: Objected to, if the Court please. No foundation has been laid; it is incompetent, irrelevant and immaterial, and has no bearing upon any issue in the case. It calls for the conclusion of the witness; calls for hearsay; assumes facts not in evidence. With respect, if the Court please, to the matter of that transcript, we object to the use of it as being a hearsay record of a hearsay record.

The Court: Let me hear the question again, will you, Mr. Reporter?

(Question read by the reporter.)

The Court: That calls for his conclusion. This witness is offered as an expert.

Mr. Strong: May I submit that these are questions which were asked as to the other defendant?

The Court: He did not object.

Mr. Strong: This is just preliminary.

The Court: The objection will be overruled, and it will call for a yes or no answer. I think your form is proper—if he determined it, whether or not in his opinion, after an investigation, he was of the opinion that there was unreported income. I think that would be an appropriate question. [818]

Mr. Strong: I will incorporate that language into my question, if I may.

The Witness: The answer is yes.

(Testimony of J. Bryant Eustice.)

Q. Will you take up the summary of adjustments which you have there, and turn to the page with reference to Phillip Himmelfarb for the year 1944.

A. Yes, sir.

Q. And the income tax return for Phillip Himmelfarb for the year 1944?

Mr. Katz: If the Court please, with reference to that summary, I believe that is a matter that was gone into before. It was based upon the working papers that had been excluded, insofar as used in 1941, which was established to be inaccurate, was prepared by others, and is not verified, and is based upon oral statements from persons that are not before this court, and based in part upon documents, and papers that have not been brought into this court. I believe that the summary is subject to the same infirmities as the working papers, and I object to it upon those grounds.

Mr. Strong: The witness testified that he did not use 1941.

The Court: That he did not use the working papers?

Mr. Strong: That's right.

The Court: He has testified he did not use the working papers in making his calculations in relation to Phillip [819] Himmelfarb for 1944 income.

Mr. Katz: The preceding question, if the Court please, was upon the basis of the investigation he made he came to a determination with respect to the income tax. The investigation consisted of the information contained in his working papers, which

(Testimony of J. Bryant Eustice.)

this Court previously distinguished. He said he did not necessarily rely upon, but did use it.

Mr. Strong: That is anticipating what the basis is. We will show what the basis is, as we go along. The witness has already testified that in making up his opinion as to what the additional income is he relied upon the income tax return for the year 1944, his bank records, which are here, and upon other documents and the books and records of the Acme Meat Company, and he specifically pointed out he did not rely upon 1941.

The Court: And whatever information was contained therein. However, he did get that information, and gave consideration to it in his investigation.

Mr. Strong: And rejected it.

The Court: He said that he rejected it; but he gathered the information. He has the information there concerning the man's bank account. He used that to verify certain items, didn't you—the information you had on your working papers?

The Witness: No, not to verify any items, which I made adjustments on. [820]

The Court: He says any items he made adjustments on. He had to verify the source of income, so he had to take that into consideration.

Mr. Strong: This is the same problem we had at the outset of the trial.

The Court: And we are just about in the same place to.

Mr. Strong: Do you mean as to a recess?

(Testimony of J. Bryant Eustice.)

The Court: I don't think it would hurt any to take a recess. I think I will have to sustain the objection, counsel. Mr. Robnett did not make a similar objection on behalf of Ormont when that question was asked. He let all the testimony go in concerning his working papers, and the summary, without objection.

Mr. Strong: But, your Honor, we have already removed the working papers from this phase of the case, by Mr. Katz' questioning.

The Court: I don't think you have removed the working papers. The witness has just now stated, in answer to a question, that he did not use this in any of the sums which he made adjustments on.

Mr. Strong: That is all we are concerned with.

The Court: You cannot be concerned with that. We are concerned with the whole income. You say his whole income was so much, and he actually reported so much. You can't try a tax case just on the basis of those overages without taking [821] into consideration the other. Objection sustained.

Q. (By Mr. Strong): Did you, in preparing this summary of adjustments, take into consideration for any purpose whatsoever any of the figures or items in Government's Exhibit 41 for identification?

Mr. Katz: Objected to, if the Court please. That has been asked and answered a number of times.

The Court: Objection sustained.

Mr. Katz: Thank you, your Honor.

The Court: Don't thank me for anything. If

(Testimony of J. Bryant Eustice.)

you weren't entitled to it I wouldn't give it to you.

Mr. Katz: I appreciate that too.

Mr. Strong: Your Honor, before I go into other phases, there are only six minutes left before 4:30. Can we recess?

The Court: Recess until 10:00 o'clock tomorrow. Remember the admonition.

(Whereupon, at 4:24 o'clock p.m., an adjournment was taken until Thursday, June 5, 1947, at 10:00 o'clock a.m.) [822]

Los Angeles, California, June 5, 1947
10:00 o'Clock A.M.

The Court: United States vs. Ormont and Himmelfarb. Mr. Strong, I understand you have a matter to present out of the presence of the jury.

Mr. Strong: I would like to present the matter once and whichever way the ruling goes I won't take any more time during the day and we may get along that much faster.

The Court: Very well.

Mr. Strong: The matter that I desire to present is with reference—

The Court: By the way—may I interrupt you—I have I think six or seven cases set for next Tuesday, OPA cases and counsel telephoned this morning and wanted to know whether or not they should subpoena their witnesses. This is Thursday. When do you think you will conclude?

Mr. Strong: Well, I have at least three more witnesses and I understand from counsel for the defendants that they may have a number of witnesses.

Mr. Robnett: That is correct.

The Court: You will probably have an accountant?

Mr. Robnett: I don't know exactly, of course, until they complete the rest of their case, but we will have a number of witnesses.

The Court: Assuming that a motion for judgment of acquittal [826] is not granted and that you do put on your defense, how long will it take?

Mr. Robnett: It will take a couple of days, anyway, I would say, as far as Mr. Ormont is concerned.

The Court: The reason I am asking if you expect to put an accountant on is because no doubt the Government will exercise the same privilege on cross-examination which you did.

Mr. Robnett: Yes, I understand.

The Court: And that is what takes time.

Mr. Robnett: It could take of course two or three days longer.

Mr. Strong: We won't be finished by Tuesday, your Honor.

The Court: I think then the only thing I can do is to vacate the settings. At the rate we are going here, Mr. Eustice is not finished yet, and you still have him on direct, and if Mr. Katz is going to take as long to cross-examine as Mr. Robnett, he will be on for some little time.

Mr. Clerk, I think you had better advise counsel

on all those cases, and I will make an order vacating the settings now and continuing all the OPA cases until the following week, that is, a week from next Tuesday.

Mr. Robnett: Your Honor, while you are talking about those things, there was a matter that I wanted to ask you about—it has nothing to do with this case—but whether or not the court would be in session in this case on Monday. [827] The reason I inquire is this——

The Court: No, I will not.

Mr. Robnett: You won't be in session?

The Court: I will not be in session, because I have a law and motion calendar and I issued an order to show cause on a writ of habeas corpus that will probably take all day.

Pardon me, Mr. Strong.

Mr. Strong: Yes, your Honor.

The basic proposition I would like to discuss just for a few moments relates to these work papers because they seem to be the stumbling block in the presentation of the Government's evidence as to what the records which are actually used as a basis for computing the income which the Government feels was unreported.

Now these working papers, which your Honor has referred to as not being out of the case, as necessarily being here because, as your Honor stated, these work papers are the basis upon which the Government Agent Eustice determined what the entire income was, and that the Government can't only show what the unreported income is but it has

to show what the entire income was, those work papers, your Honor, don't show anything as to either one of those two things.

The Court: It shows bank accounts though.

Mr. Strong: It shows bank accounts which were not used in determining any part of the income.

The Court: It shows money that went in and out of the bank accounts for that year.

Mr. Strong: Those work papers——

The Court: Apparently I do not make myself clear in connection with the matter. I understand Mr. Eustice's position is that he says he didn't use those in calculating his deficiency, or whatever you call it.

Mr. Strong: He didn't use it for calculating anything.

The Court: Yes, he did. He verified it.

Mr. Strong: He says he didn't.

The Court: I mean, he took them as true. In other words, let us say that the man's income was \$100,000, the Government contends it was \$200,000, and he reported \$100,000, so they come in and say, well, his overage is \$100,000. He reported \$100,000 so we did not take that into consideration in calculating the overage at all, that was all right.

Mr. Strong: But we don't say that at all, your Honor.

The Court: But you do say that.

Let me see the work papers.

Mr. Strong: Not the work papers, I would like to show what we rely on to show what the reported

income is as well as the unreported income. We only rely on four papers, and it isn't the work papers.

The Court: Let me see Exhibit 41.

(The document referred to was passed to the Court.) [829]

The Court: Here is a transcript of his commercial account for 1942, '43 and up to January 24th—well, here is all of 1944—deposits, here are checks, the payees in detail, deposit balances, and so forth. So it cannot be said that Mr. Eustice didn't take this into consideration in his mental processes.

Mr. Strong: May I go one step then beyond that? Our position is that he did not take it into consideration in his mental processes, that the only thing that he took in was Government's Exhibit 40-B for identification, which is a copy of a page of the Acme Meat Company showing amounts of money received by Phillip Himmelfarb during 1944, and he took into consideration Government's Exhibit 4, which is Phillip Himmelfarb's income tax return for the year 1944, also the return of his wife, Ruth Himmelfarb, which is Government's Exhibit No. 5, and he took into consideration Government's Exhibit No. 6, which is a fiscal year return. Those are the only documents which this witness took into consideration in determining, first, what the income was which was reported and in determining, second, how much additional income was unreported. Just these documents.

As a further point, the only purpose of those work papers is to refresh the recollection of the witness.

Assuming he can testify without refreshing his recollection, he could go on testifying and we don't need them at all, but because [830] there are a lot of figures and they are voluminous, he uses them to refresh his recollection.

I submit to your Honor that it isn't necessary in order to permit a witness to refresh his recollection that he be shown again all the documents that he originally used; even if one page of one document will refresh his recollection, we are only dealing with his recollection, not with the contents of the documents.

So even on the basis of his using Government's Exhibit 41 for any purpose, at best he is only using it to refresh his recollection, and here he indicated that he isn't using it to refresh his recollection because the only source of his information is other documents, and not the ones which are marked as Government's Exhibit 41 or anything contained in it.

The Court: The difficulty basically with which you are confronted, and with which I as a judge am confronted in determining, is that all Mr. Eustice's testimony is essentially hearsay testimony. In other words, he comes in here and says he went here, he went there, he went to this, he went to that, and he says this is what I found out. You are not producing a man who said, I gave Phillip Himmelfarb \$50,000 in 1944 on such and such a day.

Mr. Strong: You can't, your Honor. It is the other defendant.

The Court: Maybe you could if you had indicted

them [831] separately, but somebody chose to indict them together.

Mr. Strong: But all that Mr. Eustice is testifying to is not what somebody told him, not what conversations he had, but Mr. Eustice is testifying simply from those four documents, and that is all the whole picture. There is no conversation, nothing else.

The Court: What is that document that you have? That document is copied from a book, isn't it?

Mr. Strong: In the possession of the Acme Meat Company and the defendant Ormont, and this is the best evidence at the present time of what that book contains.

The Court: That is the best evidence so far but it is still hearsay.

Mr. Strong: But as I understand it, it is the best evidence since the defendant has the original and we can't get it.

The Court: I see your position.

Mr. Strong: There can't be anything better than this because we can't get the other one, so this becomes the best evidence.

The Court: It becomes the best evidence but it is still hearsay.

Mr. Strong: That is true, but it is an exception to the hearsay rule because it is a copy of a document which is unavailable, just like a copy of a lost document. [832]

The Court: It is not unavailable because of the fact that it has been destroyed or burned or lost or stolen; it is unavailable because the law says you

cannot have the original. Now if you cannot have the original, you cannot have a copy. I had exactly the same situation in the Rosenwasser case. I suppressed photostats, photographs, of the originals and the Circuit Court of Appeals sustained me. If the original is not available because it is a document in the possession of the defendant, then a copy of it is not available.

Mr. Strong: Provided the copy was illegally obtained, but this was not illegally obtained.

The Court: Of course there there was something of the same situation, where they went in and talked to the man and told him that they were entitled to have those documents. They say, "We are Government agents."

Mr. Strong: I think there was a recent case, the Zapp case, that went to the Supreme Court, where the agents did this, they went in and got somebody's check when he didn't even know it and didn't want them to have it. The Supreme Court said that that was all right. They got the check and photostated it and then they returned it without the defendant knowing it, and then they indicted the defendant, and the Supreme Court said that that was perfectly good because they had access to some method and they got the original check although they couldn't use the original because it was in the [833] possession of the defendant but they could use the copy. This is the second best evidence because the copy is in the possession of the defendant.

As a matter of fact, I would like to offer this document in evidence.

The Court: I want you to preserve your record because the situation may eventuate where both sides will appeal. They usually do.

Mr. Strong: May I offer Government's Exhibit 40-B in evidence then and I will re-offer it when the jury comes in just in case there is any argument on it.

The Court: Very well. I will rule on it now.

Do you wish to discuss the situation?

Mr. Katz: Unless the Court feels that a discussion is necessary on that problem. I think the objection I have made and what I have pointed out is good.

The Court: Are you objecting to the introduction of that document?

Mr. Katz: I do object to it, your Honor, on the ground it is hearsay, incompetent, irrelevant and immaterial, no foundation laid, no corpus delicti established. It is inadmissible.

Mr. Strong: This is the corpus delicti. We can't establish it until we establish it. The witness testified that this was a copy of the original record which he made, and the [834] original record is in the possession of the defendant. We issued process here which, through a misconception, it is still not available to us so this becomes the best evidence. The witness testified that it is a copy of the original.

The Court: Having been a prosecutor myself, I can sympathize with you but I must sustain the objection.

Mr. Strong: On the ground that it is hearsay?

The Court: On all the grounds stated.

Do you have some other matters?

Mr. Strong: No.

The Court: Very well. Call the jury down.

(The jury returned to the courtroom at 10:20 o'clock a.m.) [835]

The Court: Usual stipulation?

Mr. Strong: So stipulated.

Mr. Robnett: So stipulated.

Mr. Katz: Yes, your Honor.

The Court: Mr. Eustice.

J. BRYANT EUSTICE

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

The Court: That document was marked separately last evening, was it not?

Mr. Strong: Yes, your Honor.

The Court: Proceed.

Direct Examination

(Continued)

By Mr. Strong:

Q. Mr. Eustice, showing you Government's Exhibit 40-B for identification, I ask you whether you made this copy from the books of the Acme Meat Company? A. Yes, sir, I did.

Q. And did you put down on the document, which is 40-B for identification, all the words and figures as they appeared on the original records of the Acme Meat Company?

(Testimony of J. Bryant Eustice.)

Mr. Katz: Objected to, if the court please, as calling for his conclusion; also not the best evidence. The books and records would show by the best evidence what they contain.

The Court: Your last objection is not good. The first [836] objection is. The objection is sustained on the ground it is his conclusion.

Q. (By Mr. Strong): Will you state what you did, what facts and figures you put down in copying from the Acme Meat Company records onto Government's Exhibit 40-B for identification?

The Court: Without stating the contents.

Q. (By Mr. Strong): Just the general terms, without going into the contents.

A. I copied the exact figures——

Mr. Katz: Objected to, if the court please, as calling for a conclusion of this witness.

The Court: Objection sustained.

Mr. Katz: I move to strike the answer on that ground.

Q. (By Mr. Strong): Now, Mr. Eustice, forgetting Mr. Himmelfarb for a while and to go back to Mr. Ormont——

The Court: Pardon me. This is redirect?

Mr. Strong: Redirect, yes, your Honor.

The Court: Very well.

Redirect Examination

By Mr. Strong:

Q. Will you look at the name at the bottom of the page of Government's Exhibit 1, the income tax return of the defendant [837] Ormont for the year

(Testimony of J. Bryant Eustice.)

1942, and also calling your attention to a slip of paper with computations that you made on cross-examination, which is marked Defendant's Exhibit M, will you examine those two which are now before you? A. Yes, sir.

Q. And in connection with the \$5200 which was reported on the income tax return as salary, and which you testified to that you changed that from salary to partnership income, did you increase the amount of income which you asserted was unreported by the sum of \$5200?

A. No, sir, I did not.

Q. On cross-examination there were questions asked you regarding a sum of \$200 shown on the books of the Acme Meat Company, as you testified, as having come from a Mr. Allen in 1942. Do you remember that?

The Court: Nolan Allen.

The Witness: I remember the item. It did not appear on the books and records of the Acme Meat Company.

Q. (By Mr. Strong): There was a discussion of that amount of \$200. Do you recall that?

A. Yes, sir.

Q. And then there was a discussion as to a payment by Nolan Allen of sum funds in 1941; there was testimony by Mr. Kosdon to a letter—do you remember that? [838]

A. Yes, sir; I do.

Q. As to that \$200, with reference to Mr. Allen,

(Testimony of J. Bryant Eustice.)

did you include that in your computations as additional unreported income for the year 1942?

A. No, sir, I did not.

Q. You were asked on cross-examination as to the practice of sending a bill to the taxpayer where additional unreported income was claimed to exist.

Do you remember that? A. Yes, sir.

Q. Do you send those bills?

A. No, sir; I did not.

Q. Do you prepare the bills?

A. No, sir; I do not.

Q. Do you know under what circumstances they are sent?

Mr. Robnett: I object to that as incompetent, irrelevant and immaterial, his opinion.

Mr. Strong: This is what was asked on cross-examination.

The Court: Yes, it was gone into. It is a matter of which the court and jury can take judicial notice. When I say "judicial notice," those are things we know, that we are supposed to know, but we don't always know precisely what they are so I will permit the witness to answer the question.

The Witness: The office I work for do not send any bills to the taxpayer.

Q. (By Mr. Strong): Do you know under what circumstances [839] bills are sent when they are sent?

Mr. Robnett: I object to that on the ground it is asking for an opinion of the witness of something

(Testimony of J. Bryant Eustice.)

that he has nothing to do with. It would be hearsay, incompetent, irrelevant and immaterial.

Mr. Strong: That is what I thought on cross-examination, your Honor.

The Court: I think on cross-examination I asked the witness some questions generally and made a statement to the jury. I think that we can take judicial notice of the fact that the Collector of Internal Revenue is the one whose duty and function it is under the law to collect it, and that Mr. Eustice, being an agent, has nothing to do with the collection. His duties and functions are in connection with auditing, calculating and computations.

Q. (By Mr. Strong): Now you were asked some questions on cross-examination as to various bonds which were made out in the name of Sam Ormont and Dora Goldberg, and you were asked as to each of the years 1943 and 1944. Did you, in computing the unreported income which you claim was in existence for the year 1943 and 1944, credit to that all of the bonds purchased in those years in the name of Mr. Ormont and Mrs. Goldberg?

A. No, sir; I did not.

Q. Which ones did you credit? [840]

A. Only amounts which were paid for from funds from unexplained sources.

Mr. Robnett: I move to strike the answer out, if the court please, as calling for a conclusion of the witness, as to which bonds they were and the way he identifies them as to how they were paid. There is no identification of the bonds at all. It is

(Testimony of J. Bryant Eustice.)

his conclusion as to whether they were paid for or how.

The Court: That is correct. It is a conclusion. I think by this time, however, the jury understand that when the witness say "unexplained sources" that that is the witness' opinion and that their function is to determine ultimately, in the event the case goes to them, whether or not it is unexplained.

Mr. Robnett: If the court please, what was the ruling?

The Court: I think that I will deny the motion, but I have instructed the jury that it is merely an expression of opinion of an expert, and that this witness here is on the witness stand as an expert and his testimony is opinion testimony. In other words, it is what he contends is unexplained, and I say I think the jury understands by this time that they are to regard his testimony in that fashion rather than as a positive and absolute fact.

Q. (By Mr. Strong): In discussing the amount of money which was credited on the books of the firm of Merrill, Lynch, Pierce, Fenner & [841] Beane, which you testified that you took in as part of the unreported income for the year 1943, did you ascertain whether that money was or was not available to the taxpayer during that year, to Mr. Ormont?

Mr. Robnett: I object to that as incompetent, irrelevant and immaterial, and it would be hearsay testimony of the witness and is therefore incompe-

(Testimony of J. Bryant Eustice.)

tent, irrelevant and immaterial and would be an opinion of the witness.

Mr. Strong: It was gone into on cross-examination.

The Court: It is not redirect because you went into that on direct. He testified on direct as to that.

Mr. Strong: But they also asked additional questions on cross. I want to clear up certain phases that were brought out on cross-examination, your Honor. I don't want to go over the direct.

The Court: I understand. Let me hear the question again.

(The question referred to was read by the reporter, as follows:

("Q. In discussing the amount of money which was credited on the books of the firm of Merrill, Lynch, Pierce, Fenner & Beane, which you testified that you took in as part of the unreported income for the year 1943, did you ascertain whether that money was or was not available to the taxpayer during that year, to Mr. Ormont?") [842]

The Court: The objection to that is sustained. He can testify as to what he did about it.

Q. (By Mr. Strong): Will you testify to what you did in that respect?

Mr. Robnett: I object to that, if the court please, as incompetent, irrelevant and immaterial. It wouldn't be bidding upon the defendant Ormont as to what he did in that connection unless it is shown

(Testimony of J. Bryant Eustice.)

that Ormont was with him or that he reported it to Mr. Ormont. It is a situation of merely a debtor and creditor crediting on the books that I owe something only makes me the debtor, that is all. I don't think that the evidence of what this witness did as to find out whether the debtor could or could not pay is immaterial. It is hearsay.

The Court: I think you are right.

Mr. Strong: It is material in determining why it was added to the unreported income.

The Court: It is still hearsay. Objection sustained.

Q. (By Mr. Strong): Now with reference to Defendants' Exhibit Y, which is a group of checks, eight \$100 checks, issued in November and December of 1942 and January of 1943, payable to Sam Ormont or S. Ormont, and issued by the Acme Meat Company, signed S. Ormont, concerning this exhibit and these checks you were asked as to whether they were or were not used to pay [843] for the \$7000 worth of bonds purchased at about that time. Do you know of your own knowledge whether or not those checks were used to pay for those bonds?

A. No, sir; I do not.

Q. And in your examination of the records of the Acme Meat Company, were those checks shown as being used to pay for bonds?

Mr. Robnett: I object to that, if the court please, as asking for an opinion of the witness and hearsay testimony as to what the books show, and the books are the best evidence as to what they show.

(Testimony of J. Bryant Eustice.)

The Court: Objection overruled.

The Witness: No, sir, they do not.

Q. (By Mr. Strong): Now showing you Defendant's Exhibit X, which is a check for \$204.75, issued by the United Dressed Beef Company, payable to Sam Ormont, dated December 11, 1942, do you know whether this check was used in payment of any bonds purchased by Sam Ormont on or about that time? A. No, sir, I do not.

Q. In your examination of the books and records of the Acme Meat Company, did they show as to what that check was used for?

Mr. Robnett: I object to that on the ground that the books would be the best evidence, and it is incompetent, irrelevant [844] and immaterial, calling for a conclusion of the witness, and nothing to show that it even went to the Acme Meat Company or that they had anything to do with it.

The Court: Let me see the exhibit.

(The document referred to was passed to the court.)

The Court: Your question is what?

(The question referred to was read by the reporter, as follows:

("Q. In your examination of the books and records of the Acme Meat Company, did they show as to what that check was used for?")

The Court: The objection is not timely, counsel. You cross-examined the witness at length upon the

(Testimony of J. Bryant Eustice.)

records, books, documents and data of the Acme Meat Company and counsel now by that examination I think you have waived any right to the objection which you have made. The objection is overruled.

The Witness: The answer is no.

Q. (By Mr. Strong): Now showing you defendant's Exhibit V, which is a check dated January 8, 1943, in the sum of \$5000, paid to the order of Sam Ormont, signed Sam Ormont—it is an Acme Meat Company check—do you know whether this check was used to pay for any of the bonds purchased by the defendant Sam Ormont?

A. I do not know that it was; no, sir. [845]

Q. And again as to the books and records of the Acme Meat Company which you examined, did they show what that check was used for?

A. No, sir. It just indicates that it was money drawn by S. Ormont.

Q. And showing you this document, which is Defendant's Exhibit O, a check dated 5/11/1942, issued by the Acme Meat Company for \$206.11, signed by Sam Ormont, paid to Sam Ormont, do you know whether this check was used to pay for any bonds purchased by the defendant Sam Ormont during or at about that period?

A. No, sir; I do not.

Q. As to the books of the Acme Meat Company, do they show that it was used in that way?

A. No, sir.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: Objected to as incompetent, irrelevant and immaterial.

The Court: As to his examination of them, you mean?

Mr. Strong: As to his examination of them.

Mr. Robnett: It is a conclusion of the witness and the books would be the best evidence. I never asked him, only from his notes as to what his notes showed as to certain things, your Honor. I don't believe it is proper for him to ask what the books show.

The Court: Counsel amended his question to say what his [846] examination of the books showed.

Mr. Strong: That is what I meant all the time.

The Court: That is what you meant all the time?

Mr. Strong: Yes.

The Court: Whether or not he found them?

Mr. Strong: Yes, he of his own knowledge.

The Court: The objection is overruled.

Q. (By Mr. Strong): Do we have an answer?

A. No, sir.

The Court: The motion to strike will be denied.

Q. (By Mr. Strong): Now I show you Government's Exhibit S, which is a check of the Acme Meat Company dated 4/26, 1943, in the sum of \$1332.27, payable to the order of S. Ormont, signed Acme Meat Company by Sam Ormont, and I ask you whether of your own knowledge you know whether this check was used to purchase any bonds by Sam Ormont or in the name of Sam Ormont.

A. No, sir; I do not.

(Testimony of J. Bryant Eustice.)

Mr. Robnett: Same objection.

The Court: Same ruling.

Q. (By Mr. Strong): Here is another check, Defendant's [847] Exhibit AA, paid to Sam Ormont, \$100, dated 1/22/43, signed Acme Meat Company by Sam Ormont; and attached to it is a check dated 1/29/43, \$100, paid to S. Ormont, signed Acme Meat Company by Sam Ormont. Do you know whether or not those checks were used to purchase any bonds in the name of Sam Ormont?

A. No, sir; I do not know.

Q. And so far as your knowledge of the books and records of the Acme Meat Company, do they show that that was used for that purpose?

A. No, sir; they do not.

Q. Here is a check for \$595.25, paid to Sam Ormont, signed Sam Ormont, Defendant's Exhibit Z. Do you know whether this check was used to purchase bonds in the name of Sam Ormont?

A. No, sir; I do not.

Q. Here is a check dated 4/3/43, it is Defendant's Exhibit CC, and it is for \$249.26, signed Sam Ormont, payable to the Treasury of the United States. Do you know whether this check was used to purchase bonds or pay for bonds purchased by Sam Ormont?

A. No, sir; I do not.

Q. I show you Defendant's Exhibit E, which is a check paid to the order of Sam Ormont, dated 12/20/44, in the sum of \$3682.00, signed Acme Meat Company by Sam Ormont. Will [848] you state whether you know whether this check was used to

(Testimony of J. Bryant Eustice.)

pay for bonds purchased in the name of Sam Ormont? A. No, sir; I do not.

Q. Do you of your own knowledge know what that check was used for?

The Court: Of your own knowledge?

The Witness: Yes, sir.

The Court: You do?

The Witness: Yes, I know what this check was used for.

The Court: Of your own knowledge?

The Witness: I don't know how broad that is, your Honor.

The Court: I mean, your own knowledge, you would pretty nearly have to be there when the money is spent.

The Witness: Well, to that extent, no, your Honor, I do not know.

Q. (By Mr. Strong): You do know from the books and records of the Acme Meat Company?

Mr. Robnett: I will object to that, if the court please.

Mr. Strong: I will withdraw the question.

Q. I show you Defendant's Exhibit T, which is a series of checks signed by Sam Ormont, the first one is dated 2/20/43 for \$494, Hachten and Robinson Livestock Com. Co., signed by Sam Ormont; the second check is dated 4/21/43 for \$26.40, Sam Ormont, Californida Livestock Com. Co., the next one is dated [849] 4/21/43 for \$157.70, Sam Ormont to another concern; another check dated 4/21/43 for \$55.20, payable to Holmes Livestock Com. Co.,

(Testimony of J. Bryant Eustice.)

signed Sam Ormont; another check dated 4/21/43 for \$77.10, signed by Sam Ormont, payable to some concern as shown on the face of the check; another check dated 4/21/43, payable to D. H. Lillywhite, for \$249.30, signed by Sam Ormont; another check dated 4/22/43, \$35.40, payable to Gallagher Livestock Com. Co., signed by Sam Ormont; a check dated 4/22/43, \$64.35, payable to another concern shown on its face and signed by Sam Ormont; another check dated 4/22/43 for \$82.82, payable to Producers Livestock Marketing Association, signed by Sam Ormont; another check dated 4/22/43, \$89.10, payable to Southwest Commission Company, signed by Sam Ormont—I ask you whether from your examination of the books and records of the Acme Meat Company you know what those checks were issued for.

Mr. Robnett: I object to that on the ground it would be asking for hearsay testimony and is incompetent, irrelevant and immaterial. He is basing it now upon the books that are not in evidence and they would be the best evidence. He is necessarily asking for his opinion and conclusion.

The Court: His question was, from your examination of the books and records, is that right?

Mr. Strong: Yes.

The Court: Let me hear it.

(The question referred to was read by the reporter as set forth above.)

The Court: The objection is overruled.

The Witness: No, sir; I do not.

(Testimony of J. Bryant Eustice.)

The Court: Those are personal checks of Sam Ormont out of his personal bank account?

The Witness: Yes, they are, your Honor.

Q. (By Mr. Strong): Do you have any knowledge at all as to what those checks were issued for?

Mr. Robnett: I object to that on the ground it is asking for hearsay. The witness couldn't have any knowledge of his own.

The Court: I don't know. Maybe he was there.

Mr. Robnett: May I ask that he be instructed to answer yes or no? [850]

Mr. Strong: That is all he has been answering, yes or no.

Q. What was the answer? A. No.

Q. Now that was Defendant's Exhibit T, is that right? A. Yes, sir.

Q. Here is a check, Defendant's Exhibit V, which is drawn by Sam Ormont, dated September 30, 1944, payable to Roy Miller & Son for \$1932, showing that it was paid on January 9, 1943. Do you know what this check was issued for?

Mr. Robnett: I object to that on the ground it is immaterial, whether he does know or doesn't know.

The Court: The objection is overruled.

As a matter of fact, you don't know of your own knowledge what any of those checks were used for, do you?

The Witness: That is right, your Honor.

Mr. Robnett: As to that last check, I also want

(Testimony of J. Bryant Eustice.)

to interpose the further objection that it is not redirect. I did not cross-examine him on that.

Mr. Strong: These are all defense exhibits, your Honor.

Mr. Robnett: That doesn't make any difference. I didn't cross-examine this witness on that.

The Court: This is redirect. He has answered no.

Mr. Robnett: Even so, your Honor, we probably can save time. I am willing to stipulate—— [851]

The Court: I just asked him, as a matter of fact you don't know what any of the checks were actually issued for, and he said no.

Mr. Strong: Is that a stipulation?

Mr. Robnett: I will stipulate that this witness doesn't know anything about what any of the checks were used for or what money or what funds were used to purchase any of the bonds or what bonds the defendant Sam Ormont over purchased.

Q. (By Mr. Strong): Do you know from your examination of the books and records of the Acme Meat Company whether any of the checks, which are defendant's Exhibits B, C, D, P and R, do you know from that examination what they were used for?

Mr. Robnett: I object to that as having been asked and answered.

Mr. Strong: This is from the books, whether the books show it, your Honor.

The Court: Whether or not he found them?

Mr. Strong: Yes.

(Testimony of J. Bryant Eustice.)

The Court: Did you find anything in the books to show what they were used for? (Incidentally, your objection is overruled.)

Q. (By Mr. Strong): In other words, you found nothing——

The Court: Wait until he answers my question.

Mr. Strong: I thought you overruled it because he answered it.

The Court: No, he hasn't answered yet.

Did you find anything in the books indicating what those checks were actually used for?

The Witness: No, your Honor, I did not.

The Court: All right.

Q. (By Mr. Strong): Now as to these defendant's exhibits which I have questioned you about, all of these checks, Defendant's Exhibits B, C——

The Court: Why repeat them? You just got through mentioning them.

Q. (By Mr. Strong): Do the books and records, from your examination of them, of the Acme Meat Company, show anything as to those checks at all?

A. (Examining documents)

Mr. Strong: I have some more checks that I overlooked, DD. May I include those as part of the question?

Mr. Robnett: Yes, include them all.

The Witness: Certain of these checks are not recorded on the books and records of the Acme Meat Company and are not drawn on that bank account.

Mr. Robnett: I move to strike that out as a

(Testimony of J. Bryant Eustice.)

conclusion [853] of the witness. That statement is not responsive to the question.

The Court: The question is whether or not you found anything in the books and records. Not whether they actually are or aren't. Did you or didn't you find it?

The Witness: On some of these checks, your Honor, yes.

The Court: Some of them you found some record of?

The Witness: I would have to divide which are on the books and records of the Acme Meat Company and which are drawn on the defendant's personal bank account.

The Court: Obviously a check of the Acme Meat Company would be in the books and records, wouldn't it?

The Witness: Yes, your Honor.

Mr. Strong: It may.

The Court: It would have to be a check and it is a part of the records.

Q. (By Mr. Strong): Which are the ones which were on the records of the Acme Meat Company?

The Court: You mean which he found?

Mr. Strong: Yes. I always mean which he found because we don't have the record.

The Witness: Exhibits AA, DD, Y and B are on the books and records. There are two others that are on the books and records, E and Q, and also S.

Q. (By Mr. Strong): As to these exhibits which you just testified you found on the books and records

(Testimony of J. Bryant Eustice.)

of the Acme Meat Company, will you state as to each one whether or not those books and records, as you found them, showed what those checks were for?

A. Yes, sir.

Q. Take them one by one and state what you found.

A. Exhibit AA, these checks are charged to Mr. Ormont's drawing account——

Mr. Robnett: I move to strike the answer as not responsive, if the Court please. He was asked if it showed what they were for. Merely charging them to something doesn't show what they were for.

Mr. Strong: I said to state what he found.

The Court: Read the question.

(The question referred to was read by the reporter as set forth above.)

The Court: Upon the books and records?

Mr. Strong: Yes. That is the preceding question.

The Court: Objection overruled.

The Witness: Exhibit AA——

Q. (By Mr. Strong): Is that the first one you are talking about? A. Yes, sir. [855]

Q. Go ahead.

A. Is charged to the drawing account of Mr. Ormont.

Q. That exhibit consists of two checks of \$100 apiece? A. Yes, sir.

Q. And in computing the sum which you claim was the unreported income for the year 1943 did you include these two checks?

A. No, sir; I did not.

(Testimony of J. Bryant Eustice.)

Q. Take the next one, please.

A. Exhibit DD, these checks were charged to Mr. Ormont's drawing account.

Q. Again asking you the same question as to whether in computing the unreported income which you claim there was, did you include in that these checks? A. No, sir; I did not.

Q. The next one.

A. Exhibit V is a check charged to Mr. Ormont's capital account, I believe; capital or drawing.

Q. That is the \$5000 check? A. Yes, sir.

Q. Did you include that as part of your computation of the unreported income for that year?

A. No, sir; I did not.

Q. The next one. [856]

A. Exhibit Y are checks charged to Mr. Ormont's drawing account.

Q. Did you include those in your computation of the unreported income for that year?

A. No, sir; I did not.

Exhibit E is a check drawn to reimburse Mr. Ormont for the cost of merchandise for the Acme Meat Company. That is a check in the sum of \$3682?

A. That is correct.

Q. Did you in computing the unreported income for that year include this sum as part of the unreported income? A. No, sir; I did not.

Q. The next one.

A. Exhibit S is another check which I believe was used for the same purpose.

(Testimony of J. Bryant Eustice.)

Q. This is a check for \$1332.27, is that right?

A. Yes, sir.

Q. Did you include that as part of the amount you claim was unreported income for that year?

A. No, sir; I did not.

Q. Have you any more?

A. Exhibit O is a check drawn by the Acme Meat Company for \$206.11. I don't recall whether that was charged to the drawing account or reimbursement for expenses.

Q. But did you include that check for \$206.11 as part [857] of the sum which you assert was unreported income for that year?

A. No, sir; I did not.

Q. I show you Defendant's Exhibit X, which is a check for \$204.75 payable to Sam Ormont and ask you whether you reported that as part of the unreported income of Sam Ormont for that year?

A. (Examining document)

Mr. Strong: Is this a good time for a recess?

The Court: We will have a short recess. Remember the admonition.

(Short recess.) [858]

The Court: The usual stipulation?

Mr. Strong: So stipulated.

Mr. Robnett: So stipulated.

The Court: Let me see Exhibit S, the check for \$1300 and some odd dollars. Mr. Eustice, I understood you to say a moment ago that from your examination of the books and records of the Acme Meat

(Testimony of J. Bryant Eustice.)

Company you did determine that this was a repayment to Sam Ormont for merchandise, or did I misunderstand you?

The Witness: I don't know whether——

The Court: Just before recess.

The Witness: I know it came out in the calculations here the other day. I believe that was what it was used for. I may have made a mistake.

The Court: Because in your testimony, on page 603, Mr. Robnett asked you whether or not you determined that that was in repayment to Sam Ormont for the check, Exhibit T. You said no, I didn't determine that. I got the impression from your testimony on cross-examination that you had not learned from your examination that that was a repayment to Ormont for money advanced in the business.

The Witness: I think I learned it here.

The Court: Oh, you learned it here?

The Witness: Yes.

The Court: Very well. [859]

Q. (By Mr. Strong): But whatever Exhibit S was for, do I understand that you did not take it into computing the income that you claim was unreported income for that year?

A. No, sir, I did not take it into income.

Q. Will you examine these other checks which you testified to?

A. Exhibit X I did not take this in as additional income either—the amount of this check.

(Testimony of J. Bryant Eustice.)

The Court: That is X?

Mr. Strong: Yes, a check for \$204.75.

The Witness: Do you wish to take each one of these separately?

Q. (By Mr. Strong): Did you, as to each of the checks which you now have in your hands, take any of the sums in——

The Court: You had better identify these, because these checks have not been identified for the record.

Q. (By Mr. Strong): Taking Defendant's Exhibit B, that's for \$1932; C, \$1300; D, \$450; P, \$206.11; R, a check for \$814.73; T, a group of checks in varying amounts; Z, a check for \$595.25, and CC, a check for \$249.26. Did you take in any one of those checks in computing the additional income which you claim was unreported? [860]

A. No, sir, I did not take the amounts of those checks in as additional income.

Q. I show you Defendant's Exhibit G, which is a sheet of paper, with various entries upon it. I will ask you whether you ever saw that before this trial?

A. No, sir, I did not.

Q. And do you know of your own knowledge, or from what you found on examining the books, whether any of the entries and the items and the figures shown on Defendant's Exhibit G are reflected in the same way on the books of the Acme Meat Company?

A. No, sir, I do not.

Q. I show you Defendant's Exhibit H, and ask

(Testimony of J. Bryant Eustice.)

you whether you ever saw this document before this trial; just that document itself.

A. No, sir, I did not.

Q. Do you know of your own knowledge, or from your examination of the books and records of the Acme Meat Company whether any of the figures on Defendant's Exhibit H correctly reflect the entries in the books and records of the Acme Meat Company?

A. No, I do not. I did not make a comparison.

Q. I show you Defendant's Exhibit U, which is a sheet of paper with some figures which you wrote down upon the dictation of counsel for the defendant, totaling the sum of [861] \$3332.27, and ask you whether you took in any part of those sums and those figures in your computation of the unreported income of the defendant Sam Ormont, for that year?

A. No, sir, I did not.

Q. And I show you Defendant's Exhibit F, which is a sheet of paper with some figures which you wrote down on cross-examination, totaling \$3682, and ask you whether, in computing the sum which you claim was the unreported income for the defendant Sam Ormont for that year—whether you took into consideration any part of that sum of those figures shown on that sheet?

Mr. Robnett: What Exhibit?

Mr. Strong: F.

A. I did not take any of this amount into income, no, sir.

Q. I show you Defendant's Exhibit Q, which is

(Testimony of J. Bryant Eustice.)

an application for a bond, and the signature appears to be that of Dora Goldberg. Will you state whether you know of your own knowledge, or whether you know of your examination of the books and records of the Acme Meat Company, or the defendant Sam Ormont, whose money was used to pay for that bond?

A. I don't know whether we identified that.

The Court: There are two questions here. The first one is whether or not you know of your own knowledge whose money it was. [862]

The Witness: I would not know.

The Court: The next is whether you found anything from your examination of the books and records.

The Witness: No, I did not find anything in the books and records regarding the purchase of this bond.

Mr. Strong: May I have the answer read?

(Answer read by the reporter.)

Q. By the way, I understand, the only books and records that you examined were of the Acme Meat Company?

A. That is correct; and I had the cancelled checks, personal checks of the defendant.

Q. Did you examine any personal records of the defendant, Sam Ormont?

A. No, sir, I did not.

Q. Were there any such records, so far as you know?

(Testimony of J. Bryant Eustice.)

Mr. Robnett: I object to that as irrelevant and immaterial, and not redirect.

The Court: Overruled.

A. Not as far as I know, no, sir.

Q. (By Mr. Strong): Did you discuss with the defendant, Sam Ormont, whether there were any such personal records?

Mr. Robnett: Objected to as incompetent, irrelevant and immaterial; not redirect examination; not binding upon the defendant; and no proper foundation has been laid. [863]

The Court: No foundation.

Mr. Strong: At any time then. We will get the time.

Mr. Robnett: It is asking for an answer on a question of fact.

The Court: He is asking for the substance of the conversation.

Mr. Robnett: Certainly.

The Court: Objection sustained.

Q. (By Mr. Strong): Did you, at any time have a discussion with the defendant, Sam Ormont, as to whether he has or has not personal books and records?

Mr. Robnett: I object to that on the ground that no foundation has been laid; that it is incompetent, irrelevant and immaterial.

The Court: Objection overruled.

A. Yes, sir, I did.

Q. (By Mr. Strong): When was that?

(Testimony of J. Bryant Eustice.)

A. I believe that was in our discussion of November 27, 1945.

Q. That's one you testified to before?

A. Yes, sir.

Q. And you identified before who was present?

A. Yes, I did. [864]

Q. What did Mr. Ormont say?

Mr. Robnett: Objected to upon the ground that it is not redirect, if the Court please. They went into these matters on their direct examination.

The Court: Yes, but on your cross examination you cross-examined the witness about whether or not Sam Ormont said so and so to him at such and such a time.

Mr. Robnett: Not at all about records, your Honor. This is going in, and putting in the conversation about records. He was not asked that. I did not ask a thing in the world on anything of that sort. I was really crossing him on their direct examination.

The Court: As to what Sam Ormont told him about certain things; it is not redirect. Objection sustained.

Mr. Strong: Can I make it a part of the redirect, as a question I forgot to ask about that on direct? That is within your Honor's discretion.

The Court: Do you mean you want to reopen the direct examination?

Mr. Strong: As to this one question. That is discretionary with your Honor.

The Court: Yes, it is. I will permit a reopening

(Testimony of J. Bryant Eustice.)

of the direct examination, and the defendant may cross-examine on it.

Mr. Robnett: Now, I object to it, if the Court please, upon the ground that no proper foundation has been laid showing [865] whether or not this witness, before talking to Mr. Ormont on the subject, advised the defendant who he was, what official position he had, what he was doing, and whether anything that was said could be used against Mr. Ormont in a future prosecution, or anything of the sort. It is in the nature of a confession, if anything, and is not admissible without first having advised the defendant of his constitutional rights.

The Court: I think the whole thing is immaterial.

Mr. Strong: I think it will become material as we go along. Certainly it is not a confession.

Mr. Robnett: It is improper to open it up at this time, then.

The Court: I think that is correct; counsel did not urge his objections before when you asked this witness concerning conversations with the defendant Sam Ormont. His objection is good upon the ground of no foundation.

Q. (By Mr. Strong): Did you, prior to the conversation on that occasion that you have just testified to, tell Mr. Ormont who you were?

A. Yes, I had properly identified myself.

The Court: The word "properly" may be stricken, and the jury instructed to disregard it.

Q. (By Mr. Strong): State what you told him in that respect.

(Testimony of J. Bryant Eustice.)

A. I had previously been introduced to Mr. Ormont and [866] shown him my commission.

Mr. Strong: I repeat the question, your Honor.

The Court: What is the question?

Mr. Strong: The question was as to the conversation.

The Court: You had better reframe the question.

Q. (By Mr. Strong): During the conversation did Mr. Ormont and you discuss his having or not having personal books and records?

Mr. Robnett: I object to that. No foundation, proper foundation, has been laid, if the Court please, and the same ground; incompetent, irrelevant and immaterial, and not redirect. It is improper to open up the case in that manner, as it involves the constitutional rights of the defendant.

Mr. Strong: The whole case involves them.

The Court: I was under the impression that counsel's cross-examination of this witness concerned the conversations with Ormont.

Mr. Strong: I thought so, your Honor.

Mr. Robnett: No, your Honor.

The Court: It is a pretty broad scope.

Mr. Robnett: There were only two or three things I asked him about, which had been asked on direct examination. He had voluntarily stated that the defendant had said such and such a thing, and I asked him about those. I went into no conversations. The prosecution did not at any time ask about [867] conversations. He did not go into any

(Testimony of J. Bryant Eustice.)

except on one occasion, that the defendant did not tell him he had other funds.

Mr. Strong: Your Honor, it is discretionary. I want him to give the full conversation.

The Court: I have permitted you to reopen the subject but counsel has urged the objection, which is sustained.

Q. (By Mr. Strong): I show you Defendant's Exhibit W, which is an application for \$7,000 worth of \$1,000 bonds. It is seven \$1,000 bonds, to be described in the name of Mr. Samuel Ormont or Mrs. Dora Goldberg, and bearing the signature of the purchaser as Samuel Ormont. Did you, from your own knowledge, or from the examination of the books and records of the Acme Meat Company know as to whose money was used to pay for those bonds?

Mr. Robnett: I object to that as a compound question, if the Court please.

The Court: It is compound. I think you had better split up your question.

Q. (By Mr. Strong): Do you know of your own knowledge whose money was used to pay for those bonds—of your own knowledge?

A. No, sir, I do not.

Q. Do you know, from knowledge you gained from your examination of the books and records of the Acme Meat Company, as to whose money was used to purchase those bonds? [868]

Mr. Robnett: Objected to upon the ground that it calls for a conclusion.

(Testimony of J. Bryant Eustice.)

The Court: It calls for a conclusion. He can testify to what he found from the books and records.

Q. (By Mr. Strong): Did you find anything that would indicate whose money was used to pay for those bonds?

A. No, sir, not of my own knowledge.

Q. Going back to Exhibit Q, which deals with one \$500 bond, in computing the amount which you claim as unreported income of the defendant Sam Ormont for that year, did you include that bond?

Mr. Robnett: I submit that is not redirect examination. He was asked about these matters on direct examination, and it was only cross-examination afterward.

Mr. Strong: The bonds were split up, and gone into extensively on cross-examination. I don't remember asking about them individually.

Mr. Robnett: That's how he had determined unreported income, because he could not find money with which to purchase those bonds on the list he had.

Mr. Strong: I don't think that is the question. You went into it bond by bond.

The Court: What is the specific question on Q?

Mr. Strong: Whether that bond was included as part of the [869] sum which the witness says was the unreported income of Ormont for that year.

The Court: What is this, one \$500 bond?

Mr. Strong: That is what it seems to say.

The Court: Objection overruled.

(Testimony of J. Bryant Eustice.)

A. No, sir, I don't find where I have taken this into account as income.

The Court: As additional income?

The Witness: As additional income.

Q. (By Mr. Strong): Now, I show you Defendant's Exhibit W, dealing with the seven \$1,000 bonds purchase, the name on the application being Sam Ormont, and ask you whether you took those bonds into account as part of the additional income, unreported income, from the defendant Sam Ormont?

A. I took \$2,000, of the purchase price of those bonds in as additional income.

Q. That is what you testified to on cross-examination in detail? A. Yes, sir.

Q. I now show you Defendant's Exhibit BB, and ask you whether you know of your own knowledge whose money was used to purchase the bond represented on this application?

A. No, sir, not of my own knowledge.

Q. Did you find anything on the books and records of the [870] Acme Meat Company which would indicate whose money was used to purchase it? A. No, sir, I did not.

Q. Did you take that bond, for the sum of \$1,000, into account as part of the sum you assert is in the unreported income of the defendant Sam Ormont?

A. These applications, I might say, don't indicate the bond number, so that I can definitely identify the bond. I believe we came to a conclusion as to the possible bonds that were purchased.

(Testimony of J. Bryant Eustice.)

Q. I want to know specifically whether you took that particular bond, shown by that application, which is Defendant's Exhibit BB?

A. I don't know definitely, no, sir.

Q. Now, I show you Defendant's Exhibit FF, the income tax return for the year 1944, with the name Dora Goldberg. Do you know whether Dora Goldberg had any income during that year of \$817.42, as shown on that return?

A. No, sir, I do not.

Q. From your examination of the books and records of the Acme Meat Company, did you find anything which would show whether she had such an income? A. No, sir, I did not.

Q. And there is shown on this same return, Defendant's Exhibit FF, the sum of \$53, tax. Do you know of your own [871] knowledge whose money was used to pay that tax?

A. No, sir, I do not.

Q. On your examination of the books and records of the Acme Meat Company, did they reveal whose money was used to pay that tax?

A. No, sir.

Q. You testified as to discussions with the defendant Sam Ormont in connection with your investigation into his income tax for the years 1942, 1943 and 1944; and I show you Government's Exhibit 6, which gives the return, the fiscal year return, which shows it was received on May 24, 1945 in the Collector's office. I ask you whether all of your discussions and your examinations of the books

(Testimony of J. Bryant Eustice.)

and records with reference to your investigation into the income tax and the income of the defendant Sam Ormont for those years was completed before May 24, 1945?

Mr. Robnett: I object to that, if the Court please, upon the ground that it is compound, in the first instance, and asks him all of his discussions and all of the examinations of his books.

Mr. Strong: I am getting the last date, your Honor.

Mr. Robnett: I object upon the further ground that it assumes something not in evidence, namely, that he had a number of discussions. There isn't any evidence that he had a number of discussions. There is evidence that at one time he spoke [872] to the defendant, he said, and talked with him. That was in November, 1945, the 17th of November.

The Court: I think the question is a little indefinite, because the fact is the witness has not yet concluded his investigation concerning Sam Ormont for those years. He is still on the witness stand about it.

Mr. Strong: He is testifying to what has passed.

The Court: I think your question could be made a little more definite and certain. Otherwise the objections will be overruled.

Mr. Strong: The objection is overruled? Can he answer?

The Court: I say otherwise he can answer.

Q. (By Mr. Strong): When was the last time that you examined the books and records of the

(Testimony of J. Bryant Eustice.)

Acme Meat Company in connection with this investigation?

A. It must have been, as near as I know, about March of 1946.

Q. What was the last conversation——

The Witness: February or March. Excuse me.

Q. ——if you had more than one, when was the last conversation you had with the defendant Ormont regarding his income for the years 1942, 1943 and 1944?

Mr. Robnett: That is assuming something not in evidence, namely, that he had more than one conversation, or had any [873] conversation concerning Mr. Ormont's income. There is no testimony on that at all. It is incompetent, irrelevant and immaterial, and not redirect.

The Court: I don't know where it is material.

Mr. Strong: To explain that would go into the Government's case.

The Court: When you finished your regular investigation you filed a report, did you?

The Witness: Yes, your Honor.

The Court: After that you were through with the investigation?

The Witness: Yes, your Honor, after I filed my report I was through.

The Court: Your investigation was finished?

The Witness: Yes.

The Court: What was the date of your report?

The Witness: March 18, 1946.

The Court: Isn't that what you want to know?

(Testimony of J. Bryant Eustice.)

Mr. Strong: I want the last time you talked to him.

The Court: March 18, 1946.

Mr. Strong: That is the date of his report.

Q. When was the last time you talked with Sam Ormont in connection with the investigation?

The Court: But you are directing your question in relation to the filing of the return. [874]

Mr. Strong: Yes, in relation to the return which was filed March 25 or 24, 1945, which is Government's Exhibit 6.

The Witness: This isn't May 24, 1945.

Mr. Robnett: May I have that answer? That isn't an answer to his question.

Mr. Strong: Let us withdraw it, your Honor. We will save time.

Mr. Robnett: I move that it be stricken then.

Mr. Strong: There was no answer.

The Court: He was just asking the witness the date that appears upon Exhibit 6, the filing date.

Mr. Robnett: Thank you.

Q. (By Mr. Strong): Mr. Eustice, you were asked some questions on cross examination with reference to the comparative statement of net worth for the year 1943, specifically with reference to an item shown on it of \$6525.58, which was composed of payment of life insurance premiums, payment on 1942 income tax, other taxes paid, personal expenses paid by check, and personal expenses paid by cash, which was gone into in detail on cross-examination as to that item of \$6525.58. In computing the amount of income which you claim was

(Testimony of J. Bryant Eustice.)

unreported by the defendant Sam Ormont, did you take into account that sum of \$6525.58?

The Court: What do you mean did he take it into account? [875]

Mr. Strong: Did he include it as part of the additional unreported income?

The Court: That is different.

The Witness: No, sir, I did not make my computation from the net worth statement.

The Court: By the way, counsel prepared and handed around to myself and other counsel these two documents.

Mr. Strong: I would like to offer them in evidence.

The Court: I was thinking they should be marked for identification.

Mr. Strong: I thought they were.

The Court: Were the originals marked for identification?

The Clerk: No, they are not.

The Court: They should be marked for identification at least. One is your original calculation of additional income.

The Witness: I haven't any of them. Counsel took them away from me some days ago.

The Court: Mr. Strong will supply a copy, and they will be marked for identification 46 and 47.

The Clerk: The confidential report of Sam Ormont will be 46.

(The document referred to was marked Government's Exhibit 46 for identification.)

(Testimony of J. Bryant Eustice.)

Mr. Strong: That is called a comparative statement of net worth. [876]

The Court: Yes.

Mr. Robnett: It is only for identification?

The Court: It is only for identification.

Mr. Strong: I offer in evidence 46.

Mr. Robnett: I object to that as a self serving declaration, if the Court please, of the witness; incompetent, irrelevant and immaterial. All of the items thereon have not been explained. It is merely a self serving declaration.

The Court: I will reserve my ruling on the admission of this document.

Mr. Strong: I would also like to offer in evidence the other document, which I believe is 47. That is also a summary of the witness' testimony.

(The document referred to was marked Government's Exhibit 47 for identification.)

The Court: That is a statement of additional income?

Mr. Strong: Yes.

The Court: The statement of net worth is 46, and the calculation of each year, of which you have a copy, will be 47.

Mr. Robnett: I object to that on the same ground.

The Court: I will reserve my ruling on each of the documents.

Mr. Strong: In that connection I would just like to refer your Honor to one case.

(Testimony of J. Bryant Eustice.)

The Court: I am familiar with it. [877]

Mr. Strong: All right.

The Court: That is in a different circuit.

Mr. Strong: The United States Circuit Court of Appeal.

The Court: I know, but it is in the Second Circuit.

Q. (By Mr. Strong): I will show you Government's Exhibit 42 for identification, and ask you whether this list of bonds was the source of the information which you had as to the matters which are shown on the face of that document?

The Court: What exhibit is that?

Mr. Strong: 42. That is the list of bonds.

The Court: What is the question?

(Question read by the reporter.)

The Court: I don't understand that.

Mr. Strong: I want to know whether he got his information from that list; then I will offer to show where that list came from later. I am just tracing it, your Honor. He testified as to the bonds, and what he did with them.

Mr. Robnett: I object to that upon the ground that it is incompetent, irrelevant and immaterial, hearsay testimony, and it never was gone into on cross examination, and would not be redirect examination of the witness on any subject whatsoever. It is opening up a new subject. The witness in his cross-examination referred to Exhibit 40.

Mr. Strong: The witness himself testified as to

(Testimony of J. Bryant Eustice.)

who he [878] got that list from. That was gone into on cross-examination.

Mr. Robnett: It would be seeking hearsay testimony.

Mr. Strong: I am not seeking hearsay testimony.

The Court: Objection overruled.

A. There was another step in there. Can I explain it?

Mr. Robnett: Answer yes or no.

Mr. Strong: Just answer yes or no.

The Court: You will have to answer that question yes or no.

The Witness: May I have the question?

The Court: Is that where you got your information concerning Sam Ormon't bonds?

The Witness: This was the source.

Mr. Strong: That is all I want to know.

The Court: Recess until 2:00 o'clock. Remember the admonition.

(Whereupon, at 12:00 o'clock noon, Thursday, June 5, 1947, a recess was taken until 2:00 o'clock p.m.) [879]

Los Angeles, California, June 5, 1947,
2:00 o'Clock P.M.

The Court: Ex parte?

The Clerk: Yes, your Honor.

(Other court matters.)

The Court: United States v. Ormont and Himelfarb. Call the jury down.

(The jury returned to the courtroom at 2:05 o'clock p.m.)

The Court: Usual stipulation?

Mr. Strong: So stipulated.

Mr. Robnett: Yes, your Honor.

Mr. Katz: So stipulated.

The Court: Proceed.

J. BRYANT EUSTICE

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Mr. Strong: I think there was an unanswered question, your Honor, if I am not mistaken.

The Court: The reporter does not have the transcript.

Do you remember, Mr. Eustice, what exhibit you were looking at just before the recess?

The Witness: No, I don't.

Mr. Strong: I will ask another question, your Honor.

The Court: Very well. [883]

Redirect Examination

(Continued)

By Mr. Strong:

Q. Mr. Eustice, there were some questions directed to you on cross-examination with reference to a bond which was issued in the name of Sam Ormont and Sue Kosdon. Do you recall that?

A. Yes, sir; I do.

(Testimony of J. Bryant Eustice.)

Q. Now I ask you whether in your computation of the sum which you assert is unreported income for that year, whether you took in as part of that unreported income the bond issued to Sam Ormont and Sue Kosdon. A. No, sir; I did not.

Q. No part of it? A. No part of it.

Q. Showing you Defendant's Exhibit EE, which is the income tax return of Sam Ormont for the year 1945, a question was directed to you on cross-examination with reference to the sum of \$19,254.76. I ask you whether you took in as part of the unreported income for the year 1944 of Sam Ormont, whether you included as part of that income any sum of \$19,254.76 appearing on Exhibit EE.

A. No, sir; I did not.

Mr. Strong: No further questions.

The Court: Recross?

Mr. Robnett: Just a few questions, your Honor.

Recross-Examination

By Mr. Robnett:

Q. Mr. Eustice, I am going to put before you Exhibits O and P, Exhibit O being a check from the Acme Meat Company to Sam Ormont for \$206.11, and Exhibit P being a check of Sam Ormont to Arthur Pacheco, P-a-c-h-e-c-o, for \$206.11. I believe I understood you correctly this morning that you testified, in answer to Mr. Strong's question, that you did not take into account in determining Mr. Ormont's income for 1943 those items, is that correct? A. Yes, sir.

(Testimony of J. Bryant Eustice.)

Q. You did not use them at all, is that correct?

A. That I did not take them into income.

Q. You did not take them into income at all?

A. No.

Q. I will ask you if you recall on May 29, 1947 testifying in this case with regard to those two exhibits——

Mr. Strong: May I have the page?

Q. (By Mr. Robnett): ——as shown on page 516 of the reporter's transcript, starting with line 5 and ending with line 17.

A. (Examining transcript) Yes, sir.

Q. You gave that testimony, didn't you?

A. That is correct; yes, sir. [885]

Q. And that testimony was as follows:

“Q. Now, Mr. Eustice, that you have seen these two checks just shown you, Exhibits O and P, I will ask you if, as a matter of fact, those items do not show absolutely to you that the item of \$206.11, which you testified about this morning as being unexplained, and therefore charged to income, was not income?

“A. That is correct. If I had observed the situation as it was that would possibly be \$206.11 less, and that would not have been taken into income.”

You also testified, I believe, this morning, that as to Exhibits S and T, S being a check of Acme Meat Company to Sam Ormont for a total of \$13,332.27, dated 4th month, 26th day of 1943, and

(Testimony of J. Bryant Eustice.)

T being an aggregate of checks, eight, I believe, in all, and I think there was an exhibit on which you totaled those—on Exhibit U, you totaled the checks up on Exhibit O as being \$1332.27, the exact amount of Exhibit S—you recall that?

A. That is correct, yes, sir.

Q. I believe you testified this morning that you did not take into account, in determining Mr. Ormont's income for 1943, either Exhibit S nor Exhibit T.

Mr. Strong: If your Honor please, I object upon the ground that the question being asked was as to unreported income which the witness claimed was—— [886]

The Court: Let him finish the question.

Mr. Strong: I thought he had finished.

The Court: Did you finish the question?

Mr. Robnett: Yes.

Mr. Strong: The question here is as to income unreported.

The Court: Let me hear the question.

(Question read by the reporter.)

The Court: No, his testimony this morning was that he did not take that into account as unexplained income or unreported income. That was your testimony this morning?

The Witness: Yes, your Honor, that is correct.

Q. (By Mr. Robnett): You did not take these exhibits, either one of them, into account in deter-

(Testimony of J. Bryant Eustice.)

mining Mr. Ormont's, as you call it, unreported income, is that correct?

A. I am sorry, I did not follow you.

Mr. Robnett: I ask that question be read.

(Question read by the reporter.)

Mr. Strong: I object to that too, because what he testified was he did not include it into unreported income.

The Court: Overruled.

A. At the time I made my audit I did not know all the facts about this check.

Q. Which check? A. Of \$1,332.27. [887]

Q. That is, from the Acme Meat Company?

A. From the Acme Meat Company, yes.

The Court: Exhibit S.

A. I did not take this amount of this check into income, no, sir.

Q. (By Mr. Robnett): I did not ask about the check——

A. I did not know all the facts about it. I don't know yet.

Q. Let us take the other exhibit, composed of these other checks. Did you take that exhibit, or any portion of it, into income in arriving at the alleged unexplained income?

A. I considered this check, amounting to \$1332.27, as money the taxpayer had spent for personal expenditures.

The Court: And called it unreported income?

The Witness: No, sir, your Honor. I did not

(Testimony of J. Bryant Eustice.)

call it unreported income. I called it money used for personal expenditures.

Q. (By Mr. Robnett): But in doing so did you not have to use that in arriving at what you determined was unexplained or unreported income?

A. I used it in the matter of tracing the defendant's funds only.

Q. Only? You did not use it in determining whether or [888] not there was any unreported income, is that correct?

A. The answer would be yes, that I used it in the process.

Q. To determine unreported income, did you?

A. Yes, sir, it was one of the items, or some of the items I had to take into account. I took them into account as money used for personal expenditures.

Q. You took it into account and put it over into the item of living expenses rather than to give it any consideration as funds available to purchase bonds, didn't you? A. That is correct.

Q. And you have already, have you not, testified that if the item was not used for living expenses, but was used to purchase bonds, that it, of necessity, would reduce to that extent what you charged as unreported income?

A. No, sir, not of necessity. [889]

Q. Well, if it had been used to purchase bonds it would have reduced what you had taken on the purchase of bonds as unaccounted for, it would

(Testimony of J. Bryant Eustice.)

reduce the amount that you determined was unaccounted for, would it not?

A. If it could be determined——

The Court: No, would it or wouldn't it?

The Witness: Can I have the question again?

The Court: As a matter of fact, I think you asked him that on cross-examination and the witness answered it would.

Mr. Robnett: Yes, I did. There is no question about that.

The Court: You have the transcript there.

Mr. Robnett: Yes, your Honor.

Q. Referring to Exhibit Y, consisting of eight checks of the Acme Meat Company to Sam Ormont, for a hundred dollars each, making \$800——

A. Yes, sir.

Q. ——did you use those items in arriving at what you determined was Mr. Ormont's unexplained income for 1943?

Mr. Strong: Your Honor, I would like to object on the ground that the question is ambiguous in the use of the word "used".

The Court: I think that was gone into by you, counsel, on your cross-examination in chief. I do not think it is recross. [890]

Mr. Robnett: Very well, your Honor.

The Court: On every one of those checks you went through the same process with the witness.

Mr. Robnett: I understood him to testify this morning that he didn't use them.

(Testimony of J. Bryant Eustice.)

The Court: That he didn't call them unreported income.

Mr. Robnett: If it is distinctly that was then of course it is different. I understood that he said that he didn't use them in arriving at the unreported income.

The Court: No, he didn't say that this morning.

Mr. Robnett: Very well. Thank you.

The Court: He testified that it was not part of the unreported income.

The Witness: Yes, I didn't take these particular checks into unreported income.

The Court: But you did take them into consideration?

The Witness: I took everything I looked at into consideration, your Honor.

The Court: All right.

Mr. Robnett: Very well. That will be all then.

The Court: Any further questions?

Mr. Robnett: No further questions.

The Court: Cross-examination, Mr. Katz?

Mr. Katz: No, your Honor.

Mr. Strong: No further questions. [891]

The Court: The witness is excused.

(Witness excused.)

The Court: Next witness.

Mr. Strong: Mr. Smith.

FRANK B. SMITH

called as a witness by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: May I have your name, sir?

The Witness: Frank B. Smith.

The Clerk: Your address, Mr. Smith?

The Witness: 359 Avenue 64, Pasadena.

The Clerk: Take the stand, please.

Direct Examination

By Mr. Strong:

Q. Mr. Smith, what is your occupation?

A. Accountant, bookkeeper.

Q. I cannot hear you, sir.

A. Accountant and bookkeeper.

Q. Do you know the defendant Sam Ormont?

A. I do.

Q. Did you during the year 1943 have any financial dealings with the defendant Sam Ormont?

Mr. Katz: Just a minute. I object on behalf of the defendant Himmelfarb and make the objection that it is not binding, incompetent, irrelevant and immaterial, and ask that we [892] have the same understanding that the objection and the ruling of the court is made to each question that is asked.

The Court: That is all right. That will be the same ruling; same situation.

The Witness: I gave——

Q. (By Mr. Strong): Just answer yes or no.

A. I did.

(Testimony of Frank B. Smith.)

Q. Approximately when was that?

A. September 28, 1943.

Q. Where did it take place?

A. At the place of business, 4360 Soto Street, Los Angeles.

Q. Your place of business? A. Yes.

Q. Who was present?

A. Mr. Ormont and myself.

Q. Were there any conversations?

A. I gave him a check——

The Court: No, were there any conversations.

The Witness: There were.

The Court: There were?

The Witness: Yes.

Mr. Strong: Did he say there were?

The Court: He said yes. [893]

Mr. Strong: May I have these documents marked for identification, your Honor, separately?

The Court: 48 and 49.

The Clerk: The check dated September 28, 1943 is Exhibit No. 48; the check dated September 23, 1941——

Mr. Strong: That is a note.

The Clerk: Yes, a note, is Exhibit 49.

(The check and note referred to were marked Government's Exhibits 48 and 49 respectively for identification.)

(Exhibiting documents to counsel.)

Mr. Robnett: To save time, we will stipulate that Mr. Smith repaid Mr. Ormont a loan of \$300 on that

(Testimony of Frank B. Smith.)

date and paid off the note that Mr. Ormont had and that there was \$63 or something like that in interest.

Mr. Strong: \$63 interest?

Mr. Robnett: Yes.

Mr. Strong: Received on that date by Mr. Ormont?

Mr. Robnett: Yes.

Mr. Strong: No further questions. I offer these in evidence, your Honor.

Mr. Robnett: No objection.

The Court: Admitted.

(The documents referred to were received in evidence and marked Government's Exhibits Nos. 48 and 49.)

The Court: Cross-examination? [894]

Mr. Robnett: No cross-examination.

The Court: The witness is excused.

(Witness excused.)

The Court: Next witness.

Mr. Strong: Mr. Phoebus.

SAMUEL J. PHOEBUS

recalled as a witness by and in behalf of the Government, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Strong:

Q. You are the same Mr. Phoebus who was sworn here in this trial previously and testified?

A. Yes, sir.

(Testimony of Samuel J. Phoebus.)

Q. Mr. Phoebus, you testified you were a special agent of the Bureau of Internal Revenue?

A. Yes, sir.

Q. When did you become a special agent of the Bureau of Internal Revenue?

A. July 1, 1945.

Q. Were you employed by the Treasury Department prior to that time, by the Bureau of Internal Revenue? A. Yes, sir.

Q. What was your capacity prior to that date?

A. I was a deputy collector. [895]

Q. You were a deputy collector until July 3rd, did you say, 1945? A. July 1st.

Q. July 1st, 1945? A. Yes, sir.

Q. Now, Mr. Phoebus, during May of 1945 did you have occasion to investigate the income tax returns of the defendant Sam Ormont for the years 1942, 1943 and 1944 and the defendant Phillip Himmelfarb for the year 1944?

Mr. Katz: Objected to, if the Court please, as incompetent, irrelevant and immaterial, no proper foundation laid, not within the issues of this case.

The Court: Overruled.

The Witness: I had an assignment at that time to make an investigation of the income tax returns of Mr. Ormont and Mr. Himmelfarb for the year 1944.

Q. (By Mr. Strong): Not '42 or '43 as to Ormont? A. Not '42 or '43.

Q. That was when you were deputy collector?

A. Yes, sir.

(Testimony of Samuel J. Phoebus.)

Q. And did you on or about the date of May 18, 1945 go to the premises of the Acme Meat Company? A. Yes, sir.

Q. Who was with you? [896]

A. Another deputy collector, Walter E. Schlick, S-c-h-l-i-c-k.

The Court: Let me hear the last previous question, Mr. Reporter.

(The record referred to was read by the reporter as set forth above.)

The Court: That was as a deputy collector?

The Witness: Yes, sir.

The Court: And not as a special agent?

The Witness: No, sir.

Mr. Strong: Is there a pending question?

The Reporter: No. [897]

Q. And did you see and speak to either Mr. Ormont or Mr. Himmelfarb that day, on the premises of the Acme Meat Company? A. Yes, sir.

Q. Which? A. With Mr. Ormont.

Q. Now, did you on that day have any discussion with Mr. Ormont, on the premises, as you testified, concerning Mr. Ormont's income for the year 1944?

A. Yes, sir.

Mr. Robnett: I object to this, if the Court please, on the ground that it is incompetent, irrelevant and immaterial; no proper foundation laid; not shown that the defendant in any discussion, if they had any, was forewarned of what their business was, or of his constitutional rights.

(Testimony of Samuel J. Phoebus.)

The Court: This witness went to see Mr. Ormont as a Deputy Collector of Internal Revenue. I can take judicial notice of the fact that a Deputy Collector of Internal Revenue is not authorized, under the law, to investigate asserted or alleged criminal violations. His function is to collect. I, therefore, don't think that in any investigation that was made in connection with the attempted collection of a tax by a Deputy Collector, the Deputy is under a duty to warn the taxpayer. The objection will be overruled.

The Witness: Will you repeat the question, please? [898]

The Court: You answered it. He was objecting by way of a motion, a motion to strike, which will be denied. I take it the same objection will be made on further efforts to secure this conversation, Mr. Robnett?

Mr. Robnett: I beg your pardon?

The Court: I take it this same objection will go to the whole conversation?

Mr. Robnett: Yes, indeed. And I believe, your Honor, that the objection as to the conversation, even though the man was not investigating in a certain way, attempts afterwards to use the evidence in a prosecution should be suppressed on the grounds stated, and I move to suppress any conversation on the ground now that he is coming in as a witness in a criminal prosecution, and if the Government can do that, by a man, growing out of

(Testimony of Samuel J. Phoebus.)

that kind of an excursion, it would be getting it in in the back door.

The Court: Can you proceed to some other matter, Mr. Strong?

Q. (By Mr. Strong): I show you Government's Exhibit 42 for identification, which is a list of bonds, and ask you if you ever saw that before.

A. Yes, sir.

Q. Where and when did you first see it?

Mr. Robnett: I object to that upon the ground that it is [899] incompetent, irrelevant and immaterial, where and when he first saw it, unless they bring it directly home to the defendant as being present at the time, and therefore it is hearsay testimony.

Mr. Strong: I can't do it in one fell swoop, your Honor.

The Court: The objection will be overruled.

A. I saw it at the Bank of America at Brooklyn and Cummings, on May 25, 1945.

Q. Did you prepare that list? A. No, sir.

Q. Do you know who prepared it?

A. Yes, sir.

Q. When was it prepared? A. When?

Q. When?

Mr. Robnett: I object to that as incompetent, irrelevant and immaterial.

A. In the afternoon——

The Court: Just a minute.

The Witness: I am sorry.

(Testimony of Samuel J. Phoebus.)

Mr. Robnett: As incompetent, irrelevant and immaterial, and hearsay testimony.

The Court: There is no foundation laid. Ask him if he knew who prepared it.

Mr. Strong: He said yes. [900]

Q. Who did prepare it?

A. William Malin, a certified public accountant.

Mr. Robnett: I move to strike the answer, if the Court please, on the same ground as my objection, and as not binding upon the defendant, not connected up in any way, hearsay testimony, and a conclusion on the part of the witness as to who prepared it.

The Court: Did you see him prepare it?

A. Yes, I did. I was there all the time and verified these things as they were being written down here.

Mr. Robnett: I move to strike out all of his statement.

Mr. Strong: That goes to the weight of it.

The Court: Motion denied.

Mr. Strong: Shall I proceed, your Honor?

The Court: I might just as well settle this question now. Proceed with your question.

Q. (By Mr. Strong): The figures and dates, and other material appearing on Government's Exhibit 42 for identification, did you compare them with the bonds which were being examined and from which this material was being copied on the occasion to which you have just testified?

Mr. Robnett: To which we object, if the Court

(Testimony of Samuel J. Phoebus.)

please, on the ground that it is hearsay testimony as to the defendant. It is not shown that he was present, or they were his bonds or [901] that he knew anything about it. No proper foundation has been laid for any such testimony.

Mr. Strong: If your Honor please, the testimony is that these bonds were in the name of the defendant.

The Court: What testimony?

Mr. Strong: These are bonds that Mr.——

The Court: What testimony is there?

Mr. Strong: Mr. Eustice testified on cross-examination as to each of these bonds.

The Court: That all of these bonds on the list were in the name of the defendant?

Mr. Strong: Yes.

The Court: That does not get around the hearsay rule.

Mr. Strong: We will establish the connection later. This is part of the connection. It takes three people in this case.

The Court: I think his objection is good under the hearsay rule.

Q. (By Mr. Strong): Going back to May 15, 1945, the occasion on which you testified you spoke to Mr. Ormont, on the premises of the Acme Meat Company, with reference to Mr. Ormont's income, will you please state what you said to Mr. Ormont, and what Mr. Ormont said to you in that connection?

Mr. Katz: I object, if the Court please, upon the ground that it is incompetent, irrelevant and

(Testimony of Samuel J. Phoebus.)

immaterial, and not [902] within the issues in this case.

The Court: That is on behalf of the defendant Himmelfarb?

Mr. Katz: That is the only one for whom I appear.

The Court: The objection will be sustained as to Mr. Himmelfarb.

Mr. Robnett: Will it be understood that my prior objection to similar questions has been made?

The Court: I think you had better state it for the record.

Mr. Robnett: I object upon the ground that it is incompetent, irrelevant and immaterial; no proper foundation has been laid; there has been no showing that this man advised the defendant Ormont what his purpose was there, or that anything he might state could be used against him; that he had a constitutional right to refuse to answer; and no proper foundation.

The Court: I think, in view of what I stated a little while ago, that the objection should be and it is overruled. [903]

Mr. Robnett: And on the further ground that there has been no corpus delicti established as to the defendant Ormont.

The Court: Overruled.

The Witness: Will you repeat the question, please?

(The question referred to was read by the reporter as set forth above.)

(Testimony of Samuel J. Phoebus.)

Mr. Strong: That is May 18, 1945.

The Witness: May 18 is the correct date.

I told him that we had an assignment to make an examination of his income tax returns——

Mr. Robnett: Will you speak a little louder?

The Witness: I am sorry.

I told him that we had an assignment to make an examination of his income tax returns and that we would like to see his retained copies of the 1944 income tax return.

He said that he didn't have it there, that it was home and that he would bring it down on a later occasion.

We asked him if all of the income which he had received was recorded on the books of the Acme Meat Company, and he said yes, it was.

We asked him if he had ever been required to pay to other people amounts which he had not recorded on his books and he said no.

We questioned him a little further and finally he said yes, there were some amounts that were paid over that are on [904] the books.

Mr. Robnett: If the Court please, although this is conversation I move to strike this testimony on the ground that this witness is now testifying as to other matters that he talked about in the conversation other than income. He is talking about matters of payments by the defendant.

The Court: That all goes to the general subject matter. The objection is overruled.

The Witness: After he had admitted that he

(Testimony of Samuel J. Phoebus.)

had made such extra payments, I asked him the question whether or not he had attempted to pass these over-payments on to his own customers, and he said no, he hadn't, that all of his income was recorded on his invoices and on his books and records.

He then asked me hypothetically, he said to me, "Supposing the Government inspector had graded A meat, meat which I had paid A prices for, as B meat"—I wish to change that.

The question was cast in a hypothetical manner. He said, "If a packer found himself in a situation where he had bought meat at A prices and the grader had graded it as B, if he attempted to pass this price on to his customers and if he admitted such a thing to the Bureau of Internal Revenue, would they in that event come in and attempt to determine his income on the presumption that all such sales had been made on this basis?"

And I told him no, that that was not the way that we [905] used in arriving at a taxpayer's income.

I suggested that the next occasion—I think we made an appointment with him for the 22nd of May—and I suggested on that occasion that he bring his individual income tax return with him and also to prepare in the meantime a statement of his present net worth.

I think I asked him on that occasion too whether or not he and Phillip Himmelfarb were partners, and he said no.

Q. (By Mr. Strong): Now subsequent to May

(Testimony of Samuel J. Phoebus.)

18, did you have a further conversation with the defendant Sam Ormont in connection with his income for the year 1944?

Mr. Schlick and I——

Q. Just say yes or no. A. Yes.

Q. When did it take place?

A. May 23, 1945.

Q. Where did it take place?

A. At the plant of the Acme Meat Company.

Q. Who was present?

A. Mr. Bircher of the Bureau of Internal Revenue and myself and Mr. Ormont.

Q. Will you state what conversation took place with Mr. Ormont on that occasion respecting the income of Ormont for 1944? [906]

Mr. Katz: Objected to, if the Court please, as hearsay as to the defendant Himmelfarb, incompetent, irrelevant and immaterial, and not within the issues of this case..

The Court: I didn't hear all of that objection.

Mr. Strong: It is the same thing.

The Court: Objection sustained.

Mr. Robnett: I wish to interpose the same objection to this conversation that I did to the prior one.

The Court: I think it becomes material to know who Mr. Bircher was, whether or not he was a deputy collector of a special agent.

Is Mr. Bircher the gentleman in the courtroom?

The Witness: Yes, sir.

The Court: Was he at that time a special agent of the Internal Revenue Bureau?

The Witness: Yes, sir.

(Testimony of Samuel J. Phoebus.)

The Court: In your conversation with Mr. Ormont at that time did either you or Mr. Bircher state to him that he need not answer any questions or that if he did any questions he might answer, his answers might be used against him or any information he gave?

The Witness: On that occasion I don't remember any such warning having been given to Mr. Ormont.

The Court: Your best recollection is that it was not?

The Witness: My best recollection is that it was not. [907]

The Court: Objection sustained.

Mr. Strong: I don't want to go into it further, but if it is on the basis of no warning I just won't go into it.

The Court: On the basis of no warning and there was present an agent authorized under the law and the regulations to investigate and investigating alleged criminal violations of the law.

Mr. Strong: There is no evidence that he was investigating alleged criminal violations.

The Court: What was he doing there?

Mr. Strong: Your Honor took judicial notice of a fact which I would like to contradict. I don't think that the special agent's duties are solely for the purpose of criminal investigation. They have a lot of other duties wholly unrelated to criminal investigations. There is no showing that this was with reference to a criminal investigation at all.

(Testimony of Samuel J. Phoebus.)

The Court: The fact that we are here today shows that it was.

Mr. Strong: Then I can't go further beyond that.

Q. Now did you have any conversation subsequent to the date of May 23, 1945? That is the one to which objection was sustained. Did you have any subsequent to that date? A. Yes.

Q. When was the subsequent one?

A. The following day, May 24. [908]

Q. 1945? A. 1945.

The Court: Were you at that time still a deputy collector?

The Witness: Yes, sir.

Q. (By Mr. Strong): You were a deputy collector until July 1, 1945?

A. Yes, sir—June 30th.

Q. And where did such conversation on May 24 take place?

A. In the office of the intelligence unit on the eighth floor of this building.

Q. Who was present?

A. Mr. Ormont, Mr. Bircher, Mr. Schlick, a deputy collector, and myself, also a deputy collector.

Q. Was anything said on that occasion to Mr. Ormont regarding his rights to testify or not to testify? A. Yes, sir.

Q. By whom? A. By Mr. Bircher.

Q. Do you recall what was said?

A. Yes, sir.

Q. Will you state what was said?

(Testimony of Samuel J. Phoebus.)

A. Mr. Bircher first asked him if he wanted to have an attorney present. [909]

Q. Asked whom?

A. Asked Mr. Ormont if he wanted to have an attorney present.

Do you want me to give his replies or merely the questions that were asked, the statements that were made?

The Court: Not his replies but was Mr. Bircher said to him concerning his rights.

The Witness: I see. That was the first occasion when these announcements were made to Mr. Ormont.

He was also told that he didn't have to answer any of the questions that he didn't want to, that he was not required to answer them, and in connection with another matter he was told that anything which he said might come out later in open court in some subsequent Government proceedings.

This is my best recollection of it, or the reply to your question.

Q. (By Mr. Strong): You heard that said, didn't you? A. Yes, sir; I was there.

Q. And Mr. Ormont was present, that is, this Mr. Ormont? A. That Mr. Ormont.

The Court: Now in response to the first question that he was *not* entitled to an attorney, what did Mr. Ormont say?

Mr. Katz: May I at that point interpose another objection, that this conversation is not binding on the defendant [910] Himmelfarb?

(Testimony of Samuel J. Phoebus.)

The Court: And the grounds?

Mr. Katz: Same grounds.

The Court: Objection sustained.

The Witness: Mr. Ormont said he didn't think he needed an attorney to tell the truth, that the thing had been bothering him, worrying him, and he wanted to get it off his mind so that he could go around and look people in the face again. And he repeated that he didn't think he needed an attorney to tell the truth.

Mr. Robnett: If the Court please, move to strike out that answer on the ground that it is incompetent, irrelevant and immaterial. That portion of it where he said he didn't think he needed an attorney to tell the truth might be responsive, but all the rest of it I don't think is in answer to that question. I think it is incompetent. It is improper to go into it at this time. There was no such warning that I think the law contemplates of his rights in this matter. And as to the fact that they might use it at the time against him, he said that Mr. Bircher said in connection with some other matter, some matter. He didn't tell him as to this particular one, if I understand his answer. I don't know what the other matter was, but that is the way I got the answer to the original question.

The Court: Some subsequent court proceedings, he said. [911]

Mr. Robnett: Yes, but I think if the answer were reread as to what Mr. Bircher was supposed to have told him, I think you will find that he said

(Testimony of Samuel J. Phoebus.)

that Mr. Bircher told him in connection with some other matter.

Q. (By Mr. Strong): Is that what Mr. Bircher said, in connection with some other matter?

Mr. Robnett: Wait a minute. I think we should have the answer read.

The Court: Yes, I think so.

(The record referred to was read by the reporter as follows:

“Q. Will you state what was said?

“A. Mr. Bircher first asked him if he wanted to have an attorney present.

“Q. Asked whom?

“A. Asked Mr. Ormont if he wanted to have an attorney present.

“Do you want me to give his replies or merely the questions that were asked, the statements that were made?

“The Court: Not his replies but what Mr. Bircher said to him concerning his rights.

“The Witness: I see. That was the first occasion when these announcements were made to Mr. [912]

“He was also told that he didn't have to answer any of the questions that he didn't want to, that he was not required to answer them, and in connection with another matter he was told that anything which he said might come out later in open court in some subsequent Government proceedings.

(Testimony of Samuel J. Phoebus.)

(“This is my best recollection of it, or the reply to your question.”)

Mr. Robnett: Do you see what I mean, your Honor?

The Court: Yes, I do.

That is all that was said to him concerning his rights?

The Witness: I think, your Honor, before we launched into a discussion of Mr. Ormont's income tax liability, Mr. Bircher said, “All right, then, we will go on and ask you questions and if you don't want to answer any of them just don't answer it, just say so and we will go on to the next question.”

The Court: That is all?

The Witness: Yes, sir.

Mr. Robnett: Now I urge the force of my objection, your Honor, that he wasn't warned that anything would be used against him. He is entitled to be warned as to that. Merely telling a man that he doesn't have to answer is one thing, and if you tell him if he does answer it will be used against him is another thing. [913]

Mr. Strong: That is what they told him, your Honor.

The Court: No.

Mr. Strong: He told him it would be used against him.

The Court: Well, I think probably it is sufficient. It is awfully thin though.

Mr. Strong: Of course it is much heavier than

(Testimony of Samuel J. Phoebus.)

I think it ought to be, but I have to take your Honor's ruling.

The Court: The objection is overruled. The motion is denied.

Q. (By Mr. Strong): Will you state what was said to Mr. Ormont and what Mr. Ormont said in reply in connection with his income for the year 1944 on the occasion to which you have just referred?

Mr. Katz: It is understood, if the Court please, that the objection goes to all of this witness' testimony relating to these conversations with Mr. Ormont?

Mr. Strong: So stipulated.

The Court: That is right. The jury will be instructed to disregard it as to the defendant Phillip Himmelfarb.

Mr. Robnett: And may it be understood that the objection that I have made, that I have a running objection to all of this too on the grounds that I have stated?

The Court: Yes, and it will be deemed that on behalf of the defendant Ormont the objection shall have been made to each and every question concerning the conversation without [914] repeating it.

Mr. Robnett: Thank you.

Mr. Strong: Does your Honor want to start the conversation now or start a recess?

The Court: We will have a short recess. Remember the admonition.

(Short recess.) [915]

(Testimony of Samuel J. Phoebus.)

Mr. Strong: So stipulated.

The Court: The question is what was said.

The Witness: This was on the occasion of the 24th——

The Court: The interview in the office of Mr. Bircher.

Q. (By Mr. Strong): On the 24th.

A. After the conversations which I have reported here just a minute ago in relation to warning Mr. Ormont——

Mr. Robnett: Speak louder, please.

A. After the conversations took place that I have just recounted a few minutes ago in regard to warning Mr. Ormont of his constitutional rights, Mr. Bircher asked Mr. Ormont to give a brief statement of his business history, and he indicated that he had started in——

Q. Who is “he,” in proper names, give them instead of the pronoun.

A. Mr. Ormont indicated that he had started in partnership with Frank Salter in 1931, known as the Acme Meat Company, and had continued in that partnership until March, 1943, when Mr. Salter retired. That he had continued——

Q. Who is he?

A. That he, Ormont, had continued to operate the Acme Meat Company as sole proprietor until May 1st, 1944, at which time he became associated with Mr. Himmelfarb. That he and Himmelfarb had a verbal agreement to share the legitimate [916] profits of the Acme Meat Company as follows: The

(Testimony of Samuel J. Phoebus.)

first \$24,000 of net profits would be shared equally between them, all amounts over of legitimate net profit would go to Ormont, and in addition to that he said, Ormont said, that they had an agreement to share the collection of overcharges from the operations of the Acme Meat Company on a fifty-fifty basis, and that those operations had started May 1st, 1944, and had been discontinued on May 18, 1945, and that for those years their profit had been \$35,000 apiece, about. Mr. Bircher asked him if he had the exact figures and he——

Q. Who is he?

A. Mr. Ormont pulled out a little memo pad, a sort of imitation gold fringed, a rather small thing, two by four, and in this book was written figures. I don't remember the exact figures, but it showed that from May 1st, 1944 until January 5, 1945 the amount was, roughly, \$12,000, and from January 6, 1945 until April 30, 1945 the balance was what was remaining of the \$35,000——

Mr. Robnett: Just a minute. All of this 1945 the witness testified to is objected to as not within the issues in this case. We are only going into the 1944 investigation. It is improper to put in evidence here of any kind, and any other year not involved here. It is not charged in the indictment. The charge is as to his income in 1944, and previous years; therefore it is incompetent, irrelevant and immaterial, and the witness is giving a conclusion as to what some papers [917] show, and not pure conversation.

(Testimony of Samuel J. Phoebus.)

The Court: Is that what Mr. Ormont said it showed, or did you see the paper?

A. He produced the paper in response to the question as to what was the exact amount of income which he had received in this fiscal year.

The Court: Do you mean he handed it to you, or did he read that?

The Witness: He handed it to Mr. Bircher.

The Court: Did you see it?

The Witness: Yes, I saw it.

The Court: I think the conversation is admissible.

Mr. Robnett: This is not part of the conversation. It is not responsive to the question.

The Court: I think it is part of the conversation. Suppose he had just chosen to write his answers.

Mr. Strong: I think it is what he did. The question is as to what he did.

The Court: That's his answer to the question, when he hands him a piece of paper. The objection will be overruled. At the appropriate time I will, of course, instruct the jury that they are to regard all oral admissions of the defendant with caution, other than those received or made by him on the witness stand.

Mr. Strong: Go ahead. [918]

A. He——

Q. Who was he?

A. Mr. Ormont then gave, at Mr. Bircher's request, gave a piece of paper from the notebook

(Testimony of Samuel J. Phoebus.)

that he had the original notation in, and this piece of paper Mr. Bircher copied the figures, showing the breakdown of the income as it had been received as between 1944 and 1945; and Mr. Ormont said that he had already filed a fiscal year return covering the amounts which were shown on that paper, and Mr. Bircher asked him: When did you file it? And he said it was filed today. Then Mr. Bircher asked him if there was any way that we could verify these amounts, or would we have to accept the figures which he gave?

Q. Who is he?

A. Which he, Mr. Ormont, gave. May I stipulate that hereafter he——

Mr. Strong: No, there are too many people present.

The Court: Yes, I think that is right. [919]

The Witness: Mr. Ormont was asked if there was any way that we could verify the amounts of money that had been received or would we have to accept the figures which he, Mr. Ormont, gave us.

Mr. Ormont said, no, there wasn't any way that he could give us to verify the amounts, that no record had been kept of it except that they would write down the amount that they had accumulated to date and when they accumulated an additional amount they would throw away the old piece of paper and retain only the current one which showed the amounts collected up to date.

Mr. Bircher asked him what the origin of the

(Testimony of Samuel J. Phoebus.)

funds was, and he said that they were collections from customers of Acme Meat Company.

So Mr. Bircher asked Mr. Ormont if he could give us the names of a few customers that we might go to to verify it, and Mr. Ormont said that he didn't see any use in giving us the names of the customers because they wouldn't provide any basis for verification; that the prices charged these people fluctuated, there was no uniform charge per pound made for these overcharges, and that sometimes no charges were made to a customer.

At the beginning of this interview, after Mr. Bircher told Mr. Ormont that any time he wanted to stop and didn't want to answer a question that he should tell us, why Mr. Bircher told him that we would prepare, as we went only, notations [920] as to what he said with the view of preparing an affidavit for Mr. Ormont to sign.

Mr. Bircher asked him at that time if he minded if we brought a stenographer in to take a stenographic record of the interview, and Mr. Ormont said that he preferred that a stenographer was not present.

So close to the end of the interview Mr. Bircher wrote up an affidavit which in general indicated——

The Court: Just a moment. Not what the affidavit was, unless it was communicated to the defendant.

The Witness: He sat next to Mr. Bircher at the table and they wrote the affidavit sentence by sentence and discussed each sentence as it was phrased on the affidavit.

(Testimony of Samuel J. Phoebus.)

And of course I don't remember the affidavit verbatim, but the essence of it was——

Mr. Robnett: Just a moment, if the court please. I submit that the affidavit would be the best evidence.

The Court: Yes, that is the best evidence.

Q. (By Mr. Strong): Mr. Phoebus, do you know where the affidavit is? A. No, sir.

Q. Did you see it at any time after this time that you testified to as being prepared?

A. Mr. Bircher put it in his brief case.

Q. Did you see it at any time thereafter? [921]

A. Yes, I saw it later the same day when he went to the Acme Meat Company plant.

Q. Do you know what happened to the affidavit? A. Yes.

Q. Will you state what happened?

A. We were up there interviewing Mr. Himmelfarb in connection with the same matter and we were attempting to draft an affidavit of a similar kind that was acceptable to Mr. Himmelfarb——

Mr. Katz: Objected to, if the court please, as no proper foundation laid, calling for a conclusion of the witness, as to any testimony as to what they were trying to do with Mr. Himmelfarb.

The Court: Yes, that may be stricken. There is no foundation.

Q. (By Mr. Strong): Just tell us what happened to the other affidavit.

The Court: Did you leave it there?

The Witness: Yes, sir.

(Testimony of Samuel J. Phoebus.)

Q. (By Mr. Strong): State what happened to it.

The Court: Well, he left it there.

Mr. Strong: He didn't, your Honor.

The Court: He just said he left it there.

The Witness: That is not an exact response, your Honor. [922]

Q. (By Mr. Strong): Would you explain what happened to it?

The Court: Without explaining any conversations with Mr. Himmelfarb.

Mr. Strong: That is right.

The Witness: We were in the office, Mr. Bircher, Mr. Schlick, myself, Mr. Ormont and one of the other defendants.

Mr. Katz: If the Court please, I submit that that doesn't make it any better.

Mr. Strong: He is just saying who was present.

The Court: Yes, that is right.

The Witness: And Mr. Ormont asked Mr. Bircher to see the affidavit which he had, he, Mr. Ormont, had previously signed in the office of the Intelligence Unit, and Mr. Bircher reached into his pocket——

Mr. Robnett: I object to this on the ground the witness keeps speaking of an affidavit. That is a conclusion. There is no showing that it was ever signed by Mr. Ormont or anything of the kind.

Mr. Strong: He just said it was.

The Court: No, he didn't say it was signed; he

(Testimony of Samuel J. Phoebus.)

said they wrote it sentence by sentence but he didn't say it was signed or sworn to.

Mr. Strong: I think the last statement was that it was signed. May I have the record read? [923]

The Court: Did Mr. Ormont sign it that day upstairs?

The Witness: Yes, sir; he did.

The Court: Was he sworn?

The Witness: He was properly sworn.

The Court: Who swore him?

The Witness: Mr. Bircher.

The Court: "Properly" is a conclusion.

The Witness: Mr. Bircher swore him.

The Court: What did he say?

The Witness: He asked him to raise his right hand and said, "Do you solemnly swear that the information on this affidavit and the facts set forth are correct and true to the best of your knowledge?" And there was a jurat form on the bottom of the affidavit.

The Court: Very well.

Q. (By Mr. Strong): Now tell us what happened to it?

A. Mr. Ormont asked Mr. Bircher if he could take a look at the affidavit which he, Mr. Ormont, had previously signed in the office of the Intelligence Unit. Mr. Bircher reached into his brief case and brought out the affidavit and handed it to Mr. Ormont. Mr. Ormont had already in his hand an affidavit which had been prepared, tentatively prepared but not signed, by Mr. Himmelfarb and—

(Testimony of Samuel J. Phoebus.)

Mr. Katz: Objected to, if the Court please, and move to [924] strike on the ground it is incompetent, irrelevant and immaterial, with respect to anything prepared or tentatively prepared by the defendant Himmelfarb. There is no foundation laid, no corpus delicti established.

The Court: There isn't any foundation laid for that. Go ahead. The jury is instructed to disregard that statement as to the defendant Himmelfarb.

The Witness: He took these two documents——

Q. (By Mr. Strong): Who is he?

A. He, Mr. Ormont, took these two documents and began to fold them up and started to put them into his pocket, and Mr. Bircher, seeing what was happening to his affidavit, to Mr. Ormont's affidavit——

Mr. Robnett: I move to strike that out as a conclusion.

The Court: That is a conclusion.

Q. (By Mr. Strong): State what was done and said.

A. Mr. Bircher reached over and took hold of the affidavit himself, and there was a physical tussle which ensued, and in the middle of this physical tussle Mr. Ormont shook himself violently and threw Mr. Bircher back against the wall, and Mr. Ormont disappeared out of the door of the office and went down to the dock, the slaughtering dock, or the loading dock, and that is the last that I saw of the affidavit. [925]

(Testimony of Samuel J. Phoebus.)

Q. (By Mr. Strong): Now getting back to the conversation which you were having in the office earlier that day, where you were discussing the preparation of this affidavit, will you continue with your conversation?

A. Yes. Mr. Ormont said that most of these collections that were not recorded on the invoices of the Acme Meat Company had been collected by Mr. Himmelfarb because he, Ormont, was out buying stock all day, either in the country or in the stock-yards, and Himmelfarb's duties required him to remain in the plant and therefore that he had made the collections, the collections that were not recorded on the invoices, he made these himself.

Q. Who is he?

A. He, Himmelfarb, had made these collections.

Mr. Katz: If the Court please, it is my understanding that this conversation is all subject to the rulings and understandings heretofore made?

The Court: That is right, not binding on the defendant Himmelfarb.

Mr. Strong: Until I ask it to be applied.

The Court: It is not binding on the defendant Himmelfarb. The jury is instructed to disregard it as to the defendant Himmelfarb, as no foundation laid.

The Witness: I asked Mr. Ormont on this occasion if the [926] amount of income which he showed us there was a gross income or a net income; that is, whether or not there were any expenses to this joint enterprise which he claimed

(Testimony of Samuel J. Phoebus.)

to have had with Mr. Himmelfarb, and he said no, that any over-charges which they had been required to pay were deducted on the book of the Acme Meat Company from the regular operations, and that the amount of money which they received from their customers was the gross and the net, that the gross and the net were the same.

We told him that we planned to go out to the plant and discuss these matters with Mr. Himmelfarb, and he said he had already discussed his plan to make a disclosure to us with Himmelfarb and that Himmelfarb would be cooperative.

We asked him where the money went that he collected, the \$35,000, and he said that approximately \$7,000 had been put into his bank account in his personal checking account in the Citizens Bank and that part of the rest, or most of the rest had been re-invested in the business.

He said the collections were made mostly in currency.

Q. (By Mr. Strong): Was there any discussion as to bonds?

A. Yes, he said——

Q. Who is he?

A. He, Mr. Ormont, said that he had, that Mr. Ormont had, a safety deposit box at Brooklyn and Cummings in which he [927] had government bonds approximating \$90,000. He didn't refer to these necessarily as having their origin from these——

Q. Tell us what he said, not what he didn't.

A. We asked him about loans from other per-

(Testimony of Samuel J. Phoebus.)

sons, and he said that there were \$14,000 or \$15,000 shown on the books of the Acme Meat Company as loans from Dora Goldberg, but he, Ormont, said that only \$6500 of these loans were legitimate, that is, that had their origin from his mother.

I think that constitutes the essence of the conversation on May 24th.

Q. You didn't go into the contents of the affidavit?

A. The affidavit, the way I remember it, set forth the fact that——

Mr. Robnett: I object to that, if the court please, on the ground that the affidavit would be the best evidence, and this is secondary evidence, incompetent, irrelevant and immaterial, asking for an opinion of the witness as to what it contained. They haven't shown but what they have copies.

The Court: Do you have a copy of the affidavit?

The Witness: No, sir.

The Court: Did you make a copy of it?

The Witness: No, sir.

The Court: Did Mr. Bircher, to your knowledge?

The Witness: No, sir.

The Court: That was the only copy of the affidavit? [928]

The Witness: Yes, sir; there was no carbon.

The Court: It was handwritten?

The Witness: It was handwritten; yes, sir.

(Testimony of Samuel J. Phoebus.)

The Court: And that is the handwritten affidavit that you took out to the Acme Meat Company?

The Witness: Yes.

The Court: The objection is overruled.

The Witness: The affidavit set forth that, he, Ormont, and Himmelfarb had been operating on a fiscal year——

Mr. Katz: If the Court please, in so far as the document is offered as against the defendant Himmelfarb——

The Court: It is all the same conversation.

Mr. Katz: This, as I understand it, is the contents of a document.

Mr. Strong: Same objection.

The Court: It was conversation before it got on the document.

Mr. Katz: All right, your Honor.

The Court: It is admissible not against the defendant Himmelfarb, no foundation has been laid, and the jury is instructed again to disregard it. Go ahead.

The Witness: The affidavit set forth that he and Himmelfarb had been operating this joint venture and collecting overcharges from the customers of the Acme Meat Company, and then reproduced the amounts which appeared on that slip of paper [929] which Ormont gave which contained approximately \$12,000 received by Ormont in 1944 and \$23,000 in 1945, and set forth further that both of them, each of them, had received this amount.

(Testimony of Samuel J. Phoebus.)

It set forth that no books and records had been kept with respect to these amounts, and that it was not reported on the 1944 income tax return. [930]

Q. I have now placed before you various documents, bank records, the record of Merrill Lynch——

The Court: And so forth.

Q. (By Mr. Strong): And so forth, and other documents, and I also place before you Government's Exhibit 40 for identification, the working papers, and I will ask you——

The Court: That is, the working papers of the witness Eustice?

Mr. Strong: The witness Eustice, and you will find in those working papers red place markers. Will you turn to each of those pages and state whether those pages which have those markers were prepared by you?

A. Shall I replace the markers?

Q. Yes, leave them there. May we have him put an X on there? That is what I suggested originally. They may get lost.

Yes, you can put an X on there. We have a lot of markers. You can put an X on there, and it won't come out. And put your initials on each of the pages.

A. In the left-hand corner?

The Court: You might leave the marker there, so counsel in the trial can readily find the page without too much effort.

(Testimony of Samuel J. Phoebus.)

The Witness: Do you want me to state, as I mark my initials on it, the document?'

Mr. Strong: Yes, please.

A. The capital account of Sam Ormont from January 5, 1931 through March 31, 1943. This I copied from the books of the Acme Meat Company, in their office. The entire page is not written by me, but merely the figures.

Q. Will you circle in red the part you wrote?

A. I also copied the withdrawal account of Sam Ormont, described on the top of my work sheet as summary from March 6, 1937 until March 31, 1943.

Mr. Robnett: Just a minute, your Honor. I would like to move to strike out the answer for the purpose of objecting on the ground that this evidence is incompetent, irrelevant and immaterial, and there is no proper foundation laid for it.

The Court: He is not offering them in evidence yet.

Mr. Robnett: He is telling what he did copy. He is putting evidence in that he copied certain things, withdrawals, and certain things. I think it would become evidence, the way he is marking it. If he would just mark the document, without designating what they are. If he is going to tell what they are, he is putting in evidence here that there were some things that he copied.

The Court: He is not giving the contents of the document. It is like saying: Well I painted a picture. You have the painting hanging in front of the jury, but the picture is against the wall. Until the

(Testimony of Samuel J. Phoebus.)

jury sees the picture, how are [932] they going to tell that it is what somebody painted?

Mr. Robnett: That is true; but I figure that what he says he copied, that he copied certain things of record. the records would be the best evidence. It is secondary, and secondly, if the records were obtained from the defendants——

The Court: He will have to lay foundation in order to offer their contents. This is preliminary, I suppose, to such an effort.

Mr. Strong: Yes.

The Witness: Next is a capital account of Frank Salter, which I copied, from January 5, 1931 until March 31, 1943.

Q. Will you circle that in red, please?

A. The whole page is what I copied. There are no other figures on there. The next is an account described as Sam Ormont and Frank Salter, doing business as the Acme Meat Company. It is a trial balance, and copies of the balances in the accounts as of December 31, 1941. The same sort of a document, except that it refers to the trial balance for the period ended as of December 31, 1942. And another as of March 31, 1943. This is a record of the commercial account of Sam Ormont with the Security First National Bank in Huntington Park, covering the period March 15, 1932 until December 8, 1934. This is the commercial account of Sam Ormont in the Security First National Bank, Huntington Park, from January 8, 1940 through April

(Testimony of Samuel J. Phoebus.)

28, 1943. I am [933] marking out the portions that are Mr. Eustice's handwriting.

Q. Why don't you circle the ones that are in yours?

A. Because in this case mine constitute most of the writing on the page. This is the transcript of Sam Ormont's commercial account with the First National Bank of Vernon. It covers the period from December 31, 1930 to April 18, 1931. That is all.

Q. Are there any pages left with markers which you did not initial?

A. No, sir, I don't think so.

Q. Look at it and make sure, please.

A. That's all.

Q. Did you have any discussion with the defendant Sam Ormont on May 25, 1945?

A. Yes, sir.

Q. Who was present?

A. Mr. Malin, Mr. Bircher, Mr. Slick and myself.

Q. Was Mr. Ormont there?

A. Mr. Ormont was there.

Mr. Robnett: What date was that?

Mr. Strong: May 25.

Q. What year? A. 1945.

Q. And where did the discussion take place?

A. In one of the booths close to the safe [934] deposit boxes at the Bank of America, Brooklyn and Cummings.

Q. Will you state what was said by Mr. Ormont and by you?

(Testimony of Samuel J. Phoebus.)

Mr. Katz: Same objection, if the Court please.

The Court: Same ruling.

Q. (By Mr. Strong). About bonds. Did you discuss bonds?

A. Mr. Ormont had the bonds, which Mr. Malin was preparing the list of, and we would go through—Mr. Ormont would read or look at the bond, and hand it to me or to Mr. Bircher, and he in turn would read it to Mr. Malin, who would write it down. And he remarked—Mr. Ormont volunteered the statement, when he read that the bonds were in the name of his mother and himself,—he volunteered the statement that he had done that merely for convenience; that you could never tell what might happen to you; so that there would not be any trouble in case of death, he had put his mother's name on the bonds. We came across one or two bonds which showed the name of Mr. Ormont only, and he asked us if we knew whether he could have his mother added there as a co-tenant of the bond, without it affecting the holding period or rate of interest accruing on the bond. [935]

Q. I show you Government's Exhibit 42 again and ask you whether this was the list that was being prepared on that occasion.

A. Yes, sir; this was the list.

The Court: Was it all prepared on that occasion?

The Witness: Yes, sir.

The Court: Who is Mr. Mailin? Was he another agent?

(Testimony of Samuel J. Phoebus.)

The Witness: No, he is a certified public accountant and employed——

The Court: I remember, a certified public accountant.

Q. (By Mr. Strong): Did you bring Mr. Mailin in? A. No, sir.

Q. Who did?

Mr. Robnett: Objected to as asking for an opinion of the witness.

Mr. Strong: If he knows.

The Court: That does call for a conclusion. The objection is sustained. Who brought him in calls for a conclusion.

Mr. Strong: He might know.

The Court: He might have come in with somebody but that doesn't necessarily mean that they brought him.

Q. (By Mr. Strong): Did he come with anybody? A. Yes. [936]

Q. Who?

A. He came in with Mr. Ormont.

Q. Did Mr. Ormont say anything to Mr. Mailin?

A. No.

Q. Had you met Mr. Mailin before?

A. Yes.

Q. Did he come in with anybody on the prior occasion? A. No, sir.

Mr. Strong: May I have a minute to look through my notes? I may be finished. Also I am tired because one of my children had a nightmare last night and kept me up half the night.

(Testimony of Samuel J. Phoebus.)

The Court: You mean you are moving for a recess?

Mr. Strong: I would like to. I will just look through my notes and if I have no more questions then I will end with this witness and that will be a good place to stop, if your Honor doesn't mind.

The Court: Very well.

Mr. Strong: I guess that is all, your Honor.

The Court: Recess until 10:00 o'clock tomorrow morning. Tomorrow is Friday, and we will plan, if we do not finish tomorrow, to recess until the following Tuesday at 10:00 o'clock so you can make your plans over the weekend.

Recess until 10:00 o'clock tomorrow.

(Whereupon, at 4:00 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Friday, June 6, 1945.)

Los Angeles, California, Friday, June 6, 1947
10:00 A. M.

The Court: The usual stipulation?

Mr. Strong: So stipulated.

Mr. Robnett: So stipulated.

Mr. Strong: No further questions.

Mr. Robnett: If the Court please, and counsel, I have just discovered an omission in the type-written transcripts and have checked it with the reporter's notes. The correction is on the top of page 917. The correction, as I understand it on that line

(Testimony of Samuel J. Phoebus.)

after the word "follows" should be: "The first \$24,000 of net profits would be shared equally between them." Then there is something to be added to that, and I am going to ask the reporter to look at his notes so that we can make the addition. I will ask him to read the entire answer.

The Court: Not the entire answer. It is a long answer.

The Reporter: After the words "as follows" it should read:

"The first \$24,000 of net profits would be shared equally between them. All amounts over, of legitimate net profits, would go to Ormont."

The Court: Very well.

Mr. Strong: I understand that is correct.

The Court: The motion to correct the transcript is granted. I have made the appropriate, and I hope legible notation on the Clerk's transcript, the [941] official transcript.

Mr. Robnett: Thank you.

SAMUEL J. PHOEBUS

the witness on the stand at the time of the adjournment, being previously duly sworn, resumed the stand and testified as follows:

Cross-Examination

By Mr. Robnett:

Q. Mr. Phoebus, as I understand from your testimony, you were employed by the United States Government in the Internal Revenue Department

(Testimony of Samuel J. Phoebus.)

thereof, up to July 1st, 1944, as what is known as a Deputy Collector?

The Court: 1945, was it not?

The Witness: 1945.

Mr. Robnett: Pardon me. 1945.

A. That is correct, yes, sir.

Q. How long had you been such Deputy Collector?

A. Since August 27, 1942.

Q. I don't know anything about the duties of the different officers. Maybe some of the jurors don't. Will you tell me what your duties were as Deputy Collector?

A. We call on taxpayers for delinquent taxes, by means of information which is obtained from the files of the Collector's office, and, to determine whether or not there were any delinquent taxes. I believe that fairly sums it up. There are other duties of the Collector's office which I was never [942] assigned to, where they collect taxes which have been assessed. That is, which have been recorded on the records as being due, but have not been paid. I was never assigned to that part of the Collector's duties, but that was part of the function of the Field Division of the entire office.

Q. As a Deputy, were you also, or did you have duties to make investigations concerning taxpayers' reports?

A. In the sense that every inquiry into the taxpayer's liability is an investigation, in that sense, yes, sir, I did.

(Testimony of Samuel J. Phoebus.)

Q. To the extent only of inquiring into the taxpayer's liability, is that right?

A. Yes, sir.

Q. You say that you received an assignment to make an investigation of Mr. Ormont's tax returns for 1944, is that correct?

A. Yes, sir.

Q. And from whom do you receive such assignments, or from whom did you receive this assignment?

A. My group chief in the Collector's office, Raymond Kirklichter.

Q. Without such assignment from your group chief you would not have been authorized to make any investigation, is that correct?

Mr. Strong: I object to that as calling for a conclusion.

The Court: It is preliminary. In other words, you don't [943] just reach in and grab a file and go out and choose your own work?

A. No, sir, not exactly. [944]

Q. (By Mr. Robnett): Was it your understanding that you would not or had no authority to make any investigation of Mr. Ormont's 1944 tax returns without a special assignment from your group chief?

A. It is not my understanding that I would need a special assignment.

Q. But you did have in this case, didn't you?

A. In this case I was assigned to investigate certain meat packers in the Vernon district.

Q. You weren't assigned then just to investigate this particular defendant?

(Testimony of Samuel J. Phoebus.)

A. He among others in a group.

Q. And that was, as you testified yesterday, that assignment was to investigate Mr. Ormont's returns for the calendar year 1944?

A. I am not sure but I believe in my testimony yesterday I used the phrase "to determine the correct income tax liability," but perhaps you are right.

Q. No, I understood your testimony, which is on page 896 of the transcript, line 14, you stated, "I had an assignment at that time to make an investigation of the income tax returns of Mr. Ormont and Mr. Himmelfarb for the year 1944."

A. That is correct.

Q. Now you went down and saw Mr. Ormont, you say, after that assignment? [945]

A. Yes, sir.

Q. And you told Mr. Ormont that you had been assigned to make an examination of his income tax returns at that time, didn't you?

A. Yes, sir.

Q. You didn't tell him that you were assigned to make an examination of his 1944 return only, did you?

A. I might have used the general phrase, "we want to determine whether or not you have paid all the taxes that are due." You see, that is the function of the collector's office, the deputy collector's office.

Q. But I want to know what you said to him. What do you say now that you said to Mr. Ormont when you saw him on May 18th?

(Testimony of Samuel J. Phoebus.)

A. I believe I told him that we wanted to determine if he had paid his proper taxes.

Q. You think that is the wording you used, do you? A. Yes, sir.

Q. By the way, you say that on the 1st of July you became a special agent?

A. Yes, sir; 1945.

Q. I should say 1945. A. Yes, sir.

Q. You assumed those duties on the 1st day of July, 1945? A. Yes, sir. [946]

Q. Was that assignment to that position a promotion or a demotion?

A. I considered it a promotion.

Q. Now as special agent, what were the duties assigned to you?

The Court: You mean what are the duties assigned generally to special agents?

Mr. Robnett: Well, perhaps that would be just as well.

The Court: Or to him specifically?

Q. (By Mr. Robnett): If there were any special duties assigned to you specifically, I would like to have you state them.

The Court: Here is the law on the subject, Section 3654, Title 26:

“Every Internal Revenue agent (I take it that includes special agents) shall see that all laws and regulations relating to the collection of Internal Revenue taxes are faithfully executed and complied with, and shall aid in the

(Testimony of Samuel J. Phoebus.)

prevention, detection and punishment of any frauds in relation thereto."

Incidentally, there is a similar power given to the collector by Section 3654 and like authority to deputy collectors. [947]

Mr. Robnett: I see. Thank you, your Honor.

Q. Now you testified yesterday concerning a conversation at which you were present in this building, and I believe it took place on the 24th day of May, 1945, is that correct. A. Yes, sir.

Q. Will you tell me all parties who were present at that conversation?

A. Mr. Ormont, Special Agent Bircher, Deputy Collector Schlick and myself. I was a deputy collector at that time.

Q. You were the only persons present, were you?

A. Yes, sir.

Q. That room was on what floor of this building?

A. The eighth floor.

Q. What size room was it?

A. I would say an area about the size of the jury box, the entire jury box.

Q. And it was an enclosed room, was it?

A. There is a door but the door was open.

Q. The door was open?

A. And there are two windows.

Q. Were they both open?

A. Both windows?

Q. I mean the door. I thought you said there were two doors. [948]

A. The door was open.

(Testimony of Samuel J. Phoebus.)

Q. Where did it open to, into another room or into a corridor?

A. Into a corridor, part of the suite of offices of the intelligence unit.

Q. Now prior to that had you not requested Mr. Ormont to come up there to that room?

A. Yes.

Q. And at the time you requested him to come up there, I will ask if he didn't ask you if it would be all right for him to bring his attorney?

A. I don't remember him having asked that question.

Q. Will you say he did not ask that?

A. No, I wouldn't say he did not ask it.

Q. I will ask you if at that time, after he had asked that question, if you didn't tell him that you wanted him to come alone?

A. That is definitely not true, sir.

Q. Did you tell him anything of the kind?

A. No, sir.

Q. Now in testifying to the conversation which you gave yesterday, did you give us all the conversation? A. No, sir.

Q. Will you give us the parts you omitted?

A. I omitted no part purposely, sir. [949]

Q. I didn't say you did purposely.

A. I omitted no part that I didn't remember. I attempted to repeat the conversation to the best of my recollection.

Q. As to all that you remember?

A. Yes, sir.

(Testimony of Samuel J. Phoebus.)

Q. But you are satisfied there were some parts that you didn't remember?

Mr. Strong: He didn't say that, your Honor.

The Court: He is asking him.

The Witness: Well, if you will give me a moment to think I might think of something that I did not say, I mean which I didn't say here yesterday but which I now remember.

Q. (By Mr. Robnett): I understood you a moment ago to say that you didn't give us all the conversation. I thought you had not remembered some of it.

A. I haven't got a photographic mind. I don't remember everything that was said there, no, sir, I don't. It wouldn't be fair to say that I did.

Q. Did you make any notes of the conversation yourself? A. Yes, sir.

Q. What? A. Yes, sir; I did. [950]

Q. And you retained those notes, did you?

A. Yes, sir.

Q. When did you make them?

A. Shortly after, a day after the incident occurred, and in the case of the interview there on May 24, 1945 I made them as the interview was going on.

Q. As it was going on?

A. Yes, because Mr. Ormont didn't want a stenographer present. We felt that we wanted a record.

Q. And you have prior to testifying here refreshed your memory from those notes?

A. Yes, sir.

(Testimony of Samuel J. Phoebus.)

Q. Did you refresh your memory yesterday before you went on the stand from them?

A. Not yesterday; no sir.

Q. What day did you?

A. The day before.

Q. Have you those notes with you?

A. No, sir.

Q. Where are they?

A. They are in the office.

Q. You left them?

A. I believe they are in the office.

Q. Now did you also, prior to testifying yesterday, go over that conversation with Mr. Bircher?

A. No, sir.

Q. At any time prior to coming on the witness stand.

A. Oh, yes, prior to coming on the witness stand.

The Court: But not yesterday?

The Witness: Not yesterday; no, sir.

Q. (By Mr. Robnett): How long prior to coming onto the stand? A. A month.

Q. You haven't gone over that conversation with Mr. Bircher within the last month then?

A. No, sir.

Q. Did you also go over that conversation with Mr. Schlick—was the other gentleman present, did you say? A. Yes, sir.

Q. Have you gone over that conversation with him? Yes, sir.

Q. How recently?

A. I would say about a month ago too.

(Testimony of Samuel J. Phoebus.)

Q. What was your reason for going over the conversation with those two gentlemen if you had notes on it?

The Court: If you had what?

Mr. Robnett: If you had notes of the conversations.

The Witness: More or less an exchange of ideas.

Q. (By Mr. Robnett): As to what had transpired? A. Yes, sir. [952]

Q. And some of the testimony you gave yesterday, was that based upon that exchange of ideas in that review of that conversation with those gentlemen? A. No, sir, I don't think so.

Q. You didn't gain anything at all from them on your discussions with them as to the conversation? A. I don't think so.

Q. Now at that conversation I will ask you if Mr. Ormond didn't tell you that, so far as he was concerned, he had nothing to hide in connection with his income tax reports, he thought they were all correct; did he make that statement or any statement of that sort to you?

A. Are you referring now to the interview on May 24, 1945?

Q. Yes.

A. I don't remember him making that statement; no, sir.

Q. Do you remember him making that statement to you or any similar statement?

A. No, sir.

Q. I will ask you also if on that 24th day of

(Testimony of Samuel J. Phoebus.)

May, 1945 at that conference if Mr. Ormont didn't tell you, and the other gentlemen present, that he wanted to cooperate in any way in connection with the matter at hand and if they found that he owed any taxes they would send him a bill for it, [953] show him where he owed it, and he would be very glad to pay?

A. Yes, I think he did say that; yes, sir.

Q. Do you know [954] of any bill ever being sent to him after that?

A. No, sir, I do not know of any bill.

Q. Now, in connection with the amount that you testified to yesterday that Mr. Ormont said he and Mr. Himmelfarb had received and divided, amounting to about \$35,000 apiece, I will ask you if Mr. Ormont didn't tell you that that money came from cattle brokerage deals?

A. No, sir.

Q. He did not make any such statement?

A. No, sir.

Q. Was that statement, or any similar statement, ever made to you by Mr. Ormont?

A. No, sir.

Q. Never mentioned?

A. No, sir.

Q. He did tell you, did he not, in that conversation, the first conversation you had, that ever since he and Mr. Salter had dissolved their partnership in 1943, I believe, that he, Mr. Ormont, had been the sole owner of the Acme Meat Company, and that he, as sole owner, was doing business under the fictitious name of Acme Meat Company?

(Testimony of Samuel J. Phoebus.)

A. On the occasion of May 24—do you want me to tell you what he said?

Q. No, I am just asking you if he didn't tell you that? [955]

A. Not on the occasion of May 24th, no sir.

Q. Did he at any time tell you that?

A. Yes. He inferred it. He replied, in response to a question,—he said: These transactions could have been from sources other than from customers of the Acme Meat Company.

The Court: I think you are talking about a different thing.

Mr. Robnett: I move to strike out the answer as clearly not responsive.

The Witness: I thought he asked me if there was any other occasion.

Mr. Strong: He said at any time.

The Court: The witness is talking about the last previous question counsel asked him.

The Witness: I am sorry, sir.

The Court: I think you had better read the question.

Mr. Robnett: I would like to have that stricken.

The Court: It may be stricken, and the jury instructed to disregard it. Will you read that, Mr. Reporter, the last question?

(Question read by the reporter.)

A. The answer to that question is yes.

Mr. Robnett: Thank you.

Q. Now, he also told you, did he not, that he

(Testimony of Samuel J. Phoebus.)

and Mr. [956] Himmelfarb were not co-partners in the Acme Meat Company?

A. His answer was evasive in this connection, and qualified.

Q. Just answer the question: Did he tell you, or did he not? A. No.

Mr. Strong: I submit that he can't answer it yes or no.

The Court: He has answered it. He said no.

Mr. Strong: Obviously his previous answer shows that "No" is not the full statement.

The Court: The witness has answered the question.

Q. (By Mr. Robnett): On the 24th of May, 1945, at the conference you have testified concerning, isn't it true that Mr. Ormont told you gentlemen at that time, so far as the Acme Meat Company was concerned——

The Court: Which one is this, May 24th?

Mr. Robnett: Yes—that the only position that Mr. Himmelfarb had with him, or with his company, the Acme Meat Company, was as an employee?

The Witness: Will you repeat the question?

(Question read by the reporter.)

A. That was qualified too. The answer to that is no.

Q. He did not tell you that? A. No. [957]

The Court: Did he convey that idea to you by language other than what counsel has used?

(Testimony of Samuel J. Phoebus.)

The Witness: I can explain. It won't be responsive to his question.

The Court: Do you want to explain it?

The Witness: I do want to explain it, yes.

The Court: Go ahead.

The Witness: He said that he preferred that the association be known as something other than a partnership, because of the jeopardy it would place him in so far as the slaughtering license, and so far as his subsidy to the R.F.C. was concerned, and for that reason they had established the relationship of Himmelfarb being an employee.

Q. (By Mr. Robnett): Did not he tell you, either in that conversation, or your first conversation with him, that Mr. Himmelfarb was paid a salary? A. Yes, sir.

Q. And didn't he tell you that he, Mr. Ormont, paid social security on Mr. Himmelfarb's salary?

A. I don't remember the question of social security being raised. It might have been.

Q. And did not he tell you that he also carried Mr. Himmelfarb under his unemployment insurance?

A. The same answer as before. I don't remember. It [958] might have been.

Q. At that first conference, did he not make available to you the records of the Acme Meat Company?

The Court: At that first conference? Which one do you call the first conference?

(Testimony of Samuel J. Phoebus.)

Mr. Robnett: The very first one. That was on the 18th, I believe.

The Court: That was when Mr. Phoebus visited him at his plant?

Mr. Robnett: Yes.

The Witness: I don't think he did, no, sir.

Q. Didn't he at one of your visits there?

A. Subsequently, yes, sir.

Q. Didn't he, before he ever came up here for the conference on the 24th?

A. I think he said his books and records were in the custody of the Defense Supply Corporation, and they were not on the premises at the time.

Q. Do you say that you did not see any of the books and records of the Acme Meat Company before the 24th of May, 1945, at which time you had a conference here in this building?

A. I did not say that.

Q. I say, will you say that?

A. No, I won't say that.

Q. You did see those books at one time, didn't you? [959]

A. Yes, sir.

The Court: Did you see them before the 24th of May?

A. Yes, sir.

Q. (By Mr. Robnett): Did you note from those books that Mr. Himmelfarb was carried as an employee, and Social Security was paid, and income tax withholding was withheld from his salary?

Mr. Strong: I object to that. The books are the best evidence. This is hearsay.

(Testimony of Samuel J. Phoebus.)

The Court: Objection overruled.

A. I did not make a detailed examination of the books at that time, so I don't know when I saw the manner in which the books of the Acme Meat Company reflected the participation of Mr. Himmelfarb. I don't know whether it was when I saw them before the 24th, or subsequently.

Q. (By Mr. Robnett): It makes no difference to me when it was. You did find that that was true, did you not? A. Yes, sir.

Q. That the withholding tax was withheld from Mr. Himmelfarb's salary or income from the Acme Meat Company?

A. I don't remember having checked that particular part, the salary part of it. I do remember having seen the books and records, and that is borne out by the work papers that were prepared in my presence by Mr. Eustice. [960]

The Court: That is, the books and records reflected him as an employee?

The Witness: Yes, sir.

Q. (By Mr. Robnett): Is it not true that Mr. Ormont at the time you saw him on the 18th of May, 1945, and likewise, at the time you saw him on the 24th of May, 1945, told you that he would give you anything that you wanted in your investigation or examination?

A. He said so on the 24th.

Q. And subsequently he did, did he not, render the books and records available for your department?

(Testimony of Samuel J. Phoebus.)

A. There are two questions in there. Subsequently he did render the books and records of the Acme Meat Company for our inspection, yes.

Q. Isn't it true that at one of the times you were down to his place you looked over a number of invoices? A. Yes, sir, I did.

Q. And isn't it true that those invoices, when you received them, were in order, and that you, and whoever was with you, took them over to a table, or some place, and mixed them all up, and went away and left most of them, but took some with you? A. Yes, sir.

Q. It is true, is it not, that Mr. Ormont, on the 24th [961] day of May, 1945, at the conference where all these gentlemen were present——

A. May I correct my answer to that previous question? It is just a question of good housekeeping. We put the records back. We did not leave them all mixed up. We did take some with us, but we put the ones back in order which we left.

Q. You are sure of that now?

A. Yes, I am sure.

The Court: You put them back in order, but you don't know whether it was the right order?

The Witness: The order that I thought they were in, your Honor.

Q. (By Mr. Robnett): Now, Mr. Phoebus, I will ask you if, on the 24th day of May, 1945, at this conference where all of you gentlemen were present here in this building, that you testified concerning, if it isn't true that Mr. Ormont told you that any-

(Testimony of Samuel J. Phoebus.)

thing that was paid to Mr. Himmelfarb by the Acme Meat Company was paid to him as compensation for his services, or words to that effect?

A. No, I can't remember that.

Q. You can't remember that? A. No.

Q. You won't say he didn't say that?

A. That is right, I won't say he didn't say it.

Q. Now didn't he tell you that he had employed Mr. Himmelfarb to work for him at the Acme Meat Company plant and that he was paying Mr. Himmelfarb on a percentage basis of net profits?

A. I testified yesterday to the effect that the first \$12,000 of net profits would go to Mr. Himmelfarb and the—I will have to reframe that.

The first \$24,000 of legitimate net profits of the Acme Meat Company would be divided equally between him and Mr. Himmelfarb, and that all amounts over that would go to Ormont.

Q. Did he use the same words you have used? Are you attempting to use his language?

A. He didn't use those exact words; no.

Q. He didn't use the word "legitimate" at all, did he?

A. He did use the word "legitimate"; yes, sir.

Q. You are sure of that? A. Positive.

Q. Isn't it a fact that he told you that the profits of the Acme Meat Company would be divided as you have testified, \$25,000 would be divided between them and anything over that Mr. Ormont would get?

(Testimony of Samuel J. Phoebus.)

A. Are you still talking to the word “legitimate?”

Q. I am omitting it in this question and asking you if [963] he didn’t say it without the word “legitimate.”

A. No, sir.

Q. He never did?

A. I don’t believe he did. The phrase was used several times and he might have used it one time and another. The phrase with the use of the word “legitimate” in it is the one that impressed me.

Q. I know, but did he use that phrase or someone else in that conference use it?

Mr. Strong: That has been asked and answered, your Honor.

The Court: Objection overruled.

The Witness: He used the phrase.

Q. (By Mr. Robnett): Did anyone else in that conference use that phrase with the word “legitimate?”

A. Yes, sir, I think after he used it we kept using it.

Q. Not before he used it?

A. This chronology—I don’t know, I can’t answer that question honestly—I don’t know whether after the phrase was first used whether it was used subsequently by us. I remember that it was used subsequently by us and by him, but I have a definite recollection that he was the first to use it.

Q. You do have that? [964]

A. Yes, sir.

Q. Did you mention it in your notes?

A. Yes, sir.

(Testimony of Samuel J. Phoebus.)

Q. Would you get those notes?

A. Could I get them?

Q. Yes, could you get them?

A. I guess I could; yes, sir.

Q. When could you have them here?

A. I guess I could have them here after recess.

The Court: Your office is upstairs, is it?

The Witness: Yes, sir.

Q. (By Mr. Robnett): Will you do so, please?

A. Yes, sir.

Q. Now didn't he tell you that as an entirely side issue from the Acme Meat Company that on the 1st of May, 1944, he and Mr. Himmelfarb entered into a joint venture? A. Yes, sir.

Q. And he told you that the money, the \$35,000 plus, that he had received was received through that joint venture? A. Yes.

Q. And he likewise told you, did he not, that they, having entered into that joint venture on May 1, 1944, that they decided to and were using a fiscal year for accounting for income? [965]

A. He told me that they had that day filed a return on that basis.

Q. Yes. You subsequently found that they had filed such a return, didn't you? A. Yes, sir.

Q. And that is Exhibit 6? You have seen that here?

A. I saw the original return; I didn't see the exhibit.

The Court: There was part of the question that the witness didn't answer, I believe.

(Testimony of Samuel J. Phoebus.)

(The record referred to was read by the reporter as set forth above.)

The Court: I don't think you answered the question, did he tell you that they had decided to use a fiscal year because they had started in business on May 1st?

The Witness: No.

Q. (By Mr. Robnett): Did he say anything of that sort to you? A. Yes.

Q. What did he say to you?

A. He said they decided to report their income on a fiscal year basis.

Q. That is, as to the joint venture?

A. As to the joint venture.

Q. And on the 24th he told you that they had filed such a return? [966]

A. All the conversations about the fiscal year and the joint venture took place on the 24th.

Q. All right. He told you at all times, did he not, that the joint venture income was in no way entered on the books of the Acme Meat Company?

A. He told us that the gross and the net income were the same and that was put on the joint venture return.

The Court: That doesn't answer the question.

Mr. Robnett: Read the question.

(The question referred to was read by the reporter as set forth above.)

The Witness: To answer that I have to tell you what he said.

(Testimony of Samuel J. Phoebus.)

Q. (By Mr. Robnett): Did he say this or didn't he?

A. No. The answer is no.

Mr. Strong: May we have the explanation of what he said, your Honor, just to keep it in proper order?

Mr. Robnett: I am not asking for what he said.

The Court: I do not think so.

Q. (By Mr. Robnett): When you asked him the total amount of income from this joint venture, he at that time produced a piece of paper with some figures on it, did he not?

A. Yes, sir. [967]

Q. And that is the piece of paper that you have testified concerning and which you say Mr. Bicher took some memorandum from?

A. He took a sample copy of the page and wrote down the amounts as shown on Ormont's page from the same book.

The Court: Pardon me. By the way, did he tell you what this joint venture was?

The Witness: You mean the business that it was engaged in?

The Court: Yes.

The Witness: Yes, sir.

The Court: What was it?

The Witness: He said that they were collecting overcharges from customers of the Acme Meat Company.

The Court: That was the joint venture?

The Witness: Yes, sir.

Q. (By Mr. Robnett): He told you, did he not,

(Testimony of Samuel J. Phoebus.)

that he didn't do any collecting of any of the joint venture money? A. No.

Q. He didn't tell you that? A. No.

Q. He told you that he collected very little of it, if any? A. No. [968]

Q. He didn't tell you that?

A. Not in those words; no.

The Court: Did he convey that idea to you?

The Witness: He said most of it was collected by Himmelfarb because he was away.

Q. (By Mr. Robnett): Did he tell you the total amount that he said was taken in from the joint venture for the fiscal year beginning May 1, 1944, and ending April 30, 1945? A. Yes.

Q. He gave you that amount, didn't he?

A. Yes, sir.

Q. And he told you that was the amount they had filed the joint venture fiscal year return upon?

A. Yes, sir.

Q. You had an opportunity when you were examining the books of the Acme Meat Company to ascertain the names and addresses of the customers of the Acme Meat Company, didn't you?

A. Yes, sir.

Q. Therefore from and after the 24th day of May, 1945, you at all times knew the amount that Mr. Ormont said had been collected as a result of the joint venture?

A. Yes, I knew the rough figure. I didn't know the exact amount. It went down to cents.

(Testimony of Samuel J. Phoebus.)

Q. You didn't put the amount down in your notes? [969]

A. I didn't; no.

Q. You did have access to the joint venture return, the original of Exhibit 6 here in this case?

A. Yes.

Q. At all times thereafter, didn't you?

A. No.

Q. What was that?

A. I didn't have access to it, no. I could have seen it but I didn't have it available to see.

Q. I mean, you in your position had a perfect right to go in and look at it at any time you wanted?

A. Yes, sir.

Q. And isn't it true that that sets forth as his income from that joint venture the exact amount he, on that day, the 24th of May 1945, told you gentlemen was his income from that source?

A. I believe that is the exact amount; yes, sir.

Q. That sum is \$35,000—what is it?

A. \$694.42.

Q. Yes.

During the subsequent course of your investigation you found from the records of the Internal Revenue Department, did you not, that Mr. Ormont paid the tax in accordance with that \$35,000 and some reported there?

A. I found that on September 15th he made his estimate [970] consistent with his plan to file this income on a fiscal year basis.

The Court: You mean September 15, 1944?

(Testimony of Samuel J. Phoebus.)

The Witness: 1945.

The Court: This was filed in 1945, wasn't it?

The Witness: Yes, sir.

Mr. Robnett: That is correct. It is a fiscal year report.

The Court: Did he pay it? That was his question, did he pay the tax?

The Witness: He paid a small amount of tax in March, March 15th, in accordance with the requirements of filing an estimate, and then he paid another small amount in June and then it was less than a thousand dollars on each occasion, and then on September 15th he paid in excess of \$17,000. That is several months after we had started our investigation.

The Court: But he still wants to know, did he pay the tax in conformity with that return.

The Witness: Yes, he did; yes, sir.

Q. (By Mr. Robnett): I will ask you on what you call these estimates of income that are filed by businessmen, isn't it usual to show estimates small at the beginning because the man cannot tell what he will have and then increase it as he goes along?

Mr. Strong: That is speculative, your Honor. It is too [971] general.

The Court: Objection overruled.

The Witness: No, I wouldn't say that it was usual. Most accountants that I talk to say they——

Mr. Robnett: Just a moment.

The Court: If that question is directed to an explanation of the witness' answer which he had

(Testimony of Samuel J. Phoebus.)

given to the previous question, other than the answer which he said yes, he paid it, the last previous answer should be stricken because it was not responsive to your question.

Mr. Robnett: I move to strike it then, your Honor.

The Court: That is the answer where on a certain date he paid a small amount and in September he paid more.

Mr. Robnett: I move to strike it.

The Court: It may be stricken and the jury instructed to disregard it.

Mr. Strong: Except that it is stipulated and it is in evidence.

The Court: But it isn't part of his answer to this question.

Mr. Strong: All right.

Q. (By Mr. Robnett): Now let us go to the Acme Meat Company. Mr. Ormont told you, did he not, that the Acme Meat Company, which was Sam Ormont doing business as Acme Meat Company, owned an indebtedness [972] of some \$6500 to his mother for money he had borrowed from her?

A. Yes.

Mr. Robnett: That is all. Thank you.

Mr. Strong: Since it is 11:00 o'clock, I wonder whether counsel wishes to have the document brought down.

Mr. Robnett: Yes, I would like to have his notes when he gets them.

The Court: Mr. Katz, do you have any questions?

(Testimony of Samuel J. Phoebus.)

Mr. Katz: No, your Honor. It is my understanding that the testimony of this witness was all subject to the original ruling.

The Court: That is right.

Mr. Strong: I would like to state that I intend to make a motion to apply all the testimony to Mr. Himmelfarb.

The Court: I understand that.

Mr. Strong: I am making that statement because the witness is here for cross examination.

The Court: We will have a short recess. Remember the admonition.

(Short recess). [973]

The Court: The usual stipulation?

Mr. Strong: Yes.

Mr. Robnett: So stipulated.

Mr. Strong: I would like the record to show that we have turned over the notes to defendant's counsel.

The Court: The notes referred to in the witness' testimony this morning?

Mr. Strong: Yes.

Mr. Robnett: The notes that were taken the 24th day of May, 1945, by this witness. Mr. Strong has agreed to stipulate that nowhere in these notes of the witness, of the conference of May 24, 1945, does the word "legitimate" appear, excepting in connection with the matter of loans by the defendant's mother, where it says: Loans from mother, \$15,000, only \$6,500 legitimate. That is the only place it appears, is that correct, Mr. Strong?

(Testimony of Samuel J. Phoebus.)

Mr. Strong: So stipulated.

Mr. Robnett: There is one other question that I did want to ask the witness.

Q. Mr. Phoebus, is it not true that the defendant Sam Ormont——

The Court: Pardon me. In addition to those notes, did you make a written report?

The Witness: As Deputy Collector, yes, sir, I did.

The Court: Did you have recourse to that written report [974] before you came on the witness stand, for the purpose of refreshing your recollection?

The Witness: No.

Mr. Robnett: He answered no?

The Court: His answer was no.

The Witness: No.

Q. (By Mr. Robnett): You testified about going to the safe deposit box at Brooklyn and Cummings, Los Angeles? A. Yes, sir.

Q. At which box there were some bonds examined, is that correct? A. Yes, sir.

Q. Did you ascertain in whose name or names that box stood? A. Yes, sir.

Q. Whose?

A. It stood in the name of Sam Ormont and, I believe, his sister.

Q. Sue Kosdon? A. Sue Kosdon, yes, sir.

Q. But you do know that it stood in two names?

A. Two names, yes.

Q. And you believe that the other person was his sister?

(Testimony of Samuel J. Phoebus.)

A. I believe he said that was his sister. [975]

Mr. Robnett: That is all. Thank you. I return these to Mr. Strong.

The Court: Any redirect?

Mr. Strong: Yes, your Honor.

Redirect Examination

By Mr. Strong:

Q. These notes that we have just been talking about, which you said you made at about that conversation, do they contain a verbatim transcript of everything that was said? A. No, sir.

Q. And regardless of the notes did the defendant, Sam Ormont, use the word "legitimate" in his conversation with reference to that portion of his income, as you have testified?

Mr. Robnett: I object to that as not redirect, if the Court please.

The Court: Objection sustained.

Q. (By Mr. Strong): In connection with the questions as to whether the books and records of the Acme Meat Company which you examined show that money was paid to Phillip Himmelfarb as salary, you testified that you examined those books and records, is that not true? A. Yes, sir.

Q. And I now show you Government's Exhibit 40-B, for identification, and ask you whether this exhibit contains the [976] figures and other writings on that page which you examined?

Mr. Katz: If the Court please, if this is still under and pursuant to the understanding that an

(Testimony of Samuel J. Phoebus.)

objection is interposed, and that it only relates to Sam Ormont, I have nothing to say. On the other hand, if this is a departure, and counsel intends to proceed against the defendant Himmelfarb, I would like to make an objection.

The Court: Are you objecting?

Mr. Katz: Yes, I am objecting upon the ground that it is incompetent, irrelevant and immaterial. There is no foundation laid for it. It is hearsay against the defendant Himmelfarb. It is not the best evidence.

Mr. Robnett: I join in the same objection as to Mr. Ormont. It is incompetent, irrelevant and immaterial, and not the best evidence. The books themselves are the best evidence, and it is asking the opinion of the witness. No foundation has been laid.

Mr. Strong: The books are the best evidence.

The Court: As to the defendant Himmelfarb, the objection will be sustained. As to the defendant Ormont, the objection will be sustained on the ground that no foundation has been laid.

Q. (By Mr. Strong): Did you examine all of the books and records with reference to the matter which you testified to, the salary matter of Himmelfarb, as shown by the books and records? [977]

Mr. Katz: Same objection, if the Court please.

The Court: Same ruling.

Mr. Robnett: I object to that as asking the opinion of the witness, as to whether he examined all the records.

(Testimony of Samuel J. Phoebus.)

The Court: Objection sustained.

Q. (By Mr. Strong): What records did you examine?

Mr. Katz: Same objection, if the Court please.

The Court: Same ruling as to Himmelfarb.

The Witness: I examined the journals and the general ledger.

Q. (By Mr. Strong): And did you examine a page which showed, as you testified on cross examination, the money paid as salary to Phillip Himmelfarb?

Mr. Katz: Same objection, if the Court please.

Mr. Robnett: Objected to upon the ground that it is leading and suggestive, and asking for the conclusion of the witness. The books would be the best evidence, and the page thereof would be the best evidence of its contents.

Mr. Strong: That was my objection when the cross-examination was going on, and I was overruled.

The Court: You were overruled, and correctly so.

Mr. Strong: I am not objecting to the overruling. I just am pointing it out. [978]

The Court: There is no duty upon the defendant here to produce his books and records.

Mr. Strong: I don't say that there is.

The Court: As to the defendant Himmelfarb, the objection to the immediate question is sustained. As to the defendant Ormont, the objection will be sustained only on the ground that no foundation has been laid. And in making my ruling I am taking

(Testimony of Samuel J. Phoebus.)

into consideration the fact that there has been laid before the witness Exhibit 40-B.

Mr. Strong: Yes.

The Court: To which reference was made in the course of asking counsel's question. [979]

Mr. Strong: I will remove from the witness Exhibit 40-B. Will that remove it from his mind?

The Court: I am afraid not.

Mr. Strong: Then I won't ask any further questions on Exhibit 40-B.

Q. You were asked concerning some invoices which you said you took. I will now show you invoices in evidence which are marked Government's Exhibits 38 and 39 and ask you if you took any one of these invoices.

Mr. Katz: If the Court please, I presume now we are reverting back to where the understanding is that the objection has been made and the same ruling with respect to further questions asked by Mr. Strong.

Mr. Strong: At the present time I am not applying it to the defendant Himmelfarb.

The Court: Very well.

Mr. Katz: He tells me when he is not but I can never tell when he is.

The Court: He is not except when he says he is.

Mr. Strong: That is right, your Honor.

Mr. Robnett: I object to the question on the ground that it has already been testified to by the witness.

The Court: That is not a valid objection.

(Testimony of Samuel J. Phoebus.)

The Witness: The answer is no.

The Court: That is to say, those are none of the invoices [980] or papers which you took?

The Witness: That is correct; those are none.

The Court: Where are the ones you took? Were they ever returned to Mr. Ormont or the Acme Meat Company, or do you know?

The Witness: I have them.

The Court: You still have them?

The Witness: Yes, sir.

The Court: They have not been returned?

The Witness: That is right. My reason for not returning—no. You just have them.

Q. (By Mr. Strong): Now you testified that during the conversation the defendant Ormont told you that he was the sole owner and doing business as Acme Meat Company. Did the defendant Ormont during that same conversation tell you anything else about he was the owner?

Mr. Robnett: I object to that as having been gone into on direct, and it is not redirect examination. He asked him for the conversation yesterday and he gave it.

Mr. Strong: It was limited on the question on cross-examination to one phase of the conversation.

Mr. Robnett: I had a right to ask him certain things that were in it.

The Court: I think counsel is right. The objection is [981] sustained. The matter was gone into on direct.

Q. (By Mr. Strong): Now in connection with

(Testimony of Samuel J. Phoebus.)

the discussion at which you said the word "legitimate income" was used, was there any discussion as to any other income?

Mr. Robnett: I object to that as having been gone into on direct and it is not redirect examination.

Mr. Strong: It is part of the cross-examination, your Honor.

The Court: I know, but it was not new matter.

Mr. Strong: I did not understand that I am limited to new matter at this point.

The Court: Yes.

Mr. Strong: To matter brought out on cross?

The Court: New matter brought out on cross.

Mr. Strong: If that is your Honor's ruling I will then confine my questions to that.

The Court: The objection is sustained.

So that the jury will have some idea, the rule is on redirect examination of a witness by a party producing him, on redirect examination he can only ask questions concerning new matter developed on cross-examination, so if it has been covered in the direct once that is the only chance he has at it. [982]

Q. (By Mr. Strong): You were asked whether you had access to the names of the customers from whom Mr. Ormont said he had received this additional income.

Mr. Robnett: I submit that that is not a statement of the facts. He was not asked that on cross-examination; he was asked if he had access to the

(Testimony of Samuel J. Phoebus.)

customers of the Acme Meat Company. That is all he was asked.

The Court: In substance Mr. Strong has stated the testimony as I understood it. The objection is overruled.

Q. (By Mr. Strong): Did you?

A. You merely stated that I was asked that.

The Court: He hasn't asked a question yet.

Q. (By Mr. Strong): Did you have access to the names of customers who paid any of these additional sums?

Mr. Robnett: I object to that as asking for an opinion of the witness and not redirect examination.

The Court: It calls for the opinion and conclusion of the witness. The objection is sustained.

Q. (By Mr. Strong): As to the additional sums which you testified Mr. Ormont said he collected as part of the joint venture, what books or records were made available to you by Mr. Ormont? [983]

Mr. Robnett: I object to that as not redirect examination; incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: He said that there were no books and records, only the slip of paper which he had showing the amounts that had been received from this source.

The Court: By the way, when you were at the Acme Meat Company, did you have access to the books and records giving the names of their customers?

The Witness: Yes.

(Testimony of Samuel J. Phoebus.)

The Court: Obviously. You had the invoices of course.

The Witness: Yes.

Q. (By Mr. Strong): That is the books and records with reference to the amounts and customers shown on the books of the Acme Meat Company, is that right?

A. I didn't understand you.

Q. The list of customers was with reference to those records?

A. To the regular business of the Acme Meat Company.

Mr. Strong: That is all.

Mr. Robnett: That is all.

The Court: Mr. Katz, do you have any cross-examination?

Mr. Katz: No, your Honor.

The Court: Very well. You may step down.

(Witness excused.)

The Court: Next witness.

Mr. Strong: Mr. Malin.

WILLIAM S. MALIN

called as a witness by and in behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: William S. Malin.

The Clerk: How do you spell your last name?

The Witness: M-a-l-i-n.

(Testimony of William S. Malin.)

The Clerk: Your address?

The Witness: My business address is 639 South Spring Street.

The Clerk: Take the stand.

Direct Examination

By Mr. Strong:

Q. Mr. Malin, what is your occupation?

A. I am a public accountant, sir.

Q. Certified?

A. Certified public accountant.

Q. How long have you been a certified public accountant? A. Since 1928.

Q. Where is your place of business?

A. 639 South Spring Street. [985]

Q. Do you maintain an office there?

A. Yes, sir.

Q. Were you during the month of May 1945 acting and pursuing your profession of certified public accountant? A. Yes, sir.

Q. At that address? A. Yes, sir.

Q. Did you at any time during the month of May 1945 meet with the defendant Sam Ormont?

Mr. Robnett: As to which, your Honor, I wish to interpose an objection, and the objection requires possibly a little evidence to sustain it. It is an objection on the ground that any facts or evidence this witness might testify to are privileged. I would like to have the privilege of asking a few questions of the witness before this question is ruled upon.

(Testimony of William S. Malin.)

The Court: Let me hear the particular question.

(The question referred to was read by the reporter as set forth above.)

The Court: If the answer is no, that is the end of it. The objection is overruled to that question. You may answer the question yes or no.

The Witness: Yes, sir.

Q. (By Mr. Strong): On what date did you first meet with the defendant [986] Sam Ormont?

A. May 21st is my best recollection.

Q. What year? A. 1945.

Q. Where did you meet with him?

A. At my office.

Q. Who was present?

A. Mr. Mirman, the defendant's attorney——

The Court: May when, the 21st?

The Witness: Yes.

Q. (By Mr. Strong): Anyone else?

A. No, sir.

Q. Was the defendant present?

A. Mr. Ormont was present.

Q. And you? A. Yes, sir.

Q. That is all? A. Yes, sir.

Q. Did you have any discussion on that date with reference to the income of the defendant Sam Ormont?

Mr. Katz: Objected to, if the Court please, in so far as the defendant Phillip Himmelfarb is concerned as hearsay then and not binding as to him. We ask that the same understanding be had, that

(Testimony of William S. Malin.)

the objection is interposed to each [987] question and the same ruling until such time as it develops he is proceeding against Mr. Himmelfarb.

The Court: The objection is sustained.

Mr. Robnett: I now wish to interpose an objection on the ground that any conference that was had with Mr. Ormont with this witness was privileged. I would like to have the privilege of taking the witness on voir dire.

The Court: You may proceed.

Voir Dire Examination

By Mr. Robnett:

Q. Mr. Malin, you were introduced to Mr. Ormont, were you not, by Mr. Mirman, whom you have mentioned? A. Yes, sir.

The Court: Just a moment now. You say that you are a certified public account?

The Witness: Yes, your Honor.

The Court: Certified and licensed under the laws of the state of California?

The Witness: Yes, sir.

The Court: To practice accountancy?

The Witness: Yes, sir.

The Court: Very well.

Q. (By Mr. Robnett): And is it not and was it not a fact at that time that Mr. Mirman was an attorney at law? [988]

Mr. Strong: I will stipulate that he was an attorney at law. I know Mr. Mirman.

The Court: He is and was at that time?

Mr. Strong: Yes, you Honor.

(Testimony of William S. Malin.)

Q. (By Mr. Robnett): I will ask you, Mr. Malin, isn't it a fact that Mr. Mirman was the attorney for Mr. Ormont at that time.

A. Yes, sir. [989]

Q. And isn't it a further fact that Mr. Mirman, as attorney for Mr. Ormont, engaged you in connection with matters that he was attending to as Mr. Ormont's attorney, in connection with income taxes?

The Witness: Will you repeat the question?

(Question read by the reporter.)

Mr. Strong: I object to that as calling for the conclusion of the witness. He can state what happened. What was said.

The Court: Sustained.

Mr. Robnett: What was the ruling, your Honor?

The Court: Objection sustained.

Q. (By Mr. Robnett): Mr. Malin, prior to the 21st day of May, 1945, particularly at the time you met Mr. Ormont, isn't it true that Mr. Mireman communicated with you, and told you that he wanted to have you help him work out some matters for Mr. Ormont, his client, in connection with income taxes?

A. Not prior to the 21st. That was on the same day?

Q. On the same day? A. Yes, sir.

Q. And he did, before you met Mr. Ormont, did he not? A. Yes, sir.

Q. And pursuant to that statement to you by

(Testimony of William S. Malin.)

Mr. Mirman, he came to your office, did he? [990]

A. Yes, sir.

Q. When he came, Mr. Ormont was with him?

A. Yes, sir.

Q. Is that correct? A. That's right.

Q. And it was Mr. Mirman then who engaged you, was it not?

Mr. Strong: I object to that upon the same ground, calling for the conclusion of the witness. He can say what was said.

The Court: Sustained.

Q. (By Mr. Robnett): Did you not, in connection with any work that you performed in that regard, take your directions from Mr. Mirman?

A. Yes.

Q. That is correct, is it not? A. Yes.

Mr. Robnett: I believe that is sufficient, your Honor, to show privileged communication, on the ground that any matter that was discussed with this gentleman was discussed in the presence of Mr. Ormont's attorney, and with this gentleman, and Mr. Mirman, Mr. Ormont's attorney, was employed similar to a secretary or assistant.

The Witness: Can I get an explanation of that question, your Honor? They are talking about direction. When it comes [991] to accounting and tax matters I don't take any direction; but when it comes to a specific request, I follow those instructions.

The Court: The directions that were given to you, I think would be the only thing. If anybody gave you directions, who gave them to you?

(Testimony of William S. Malin.)

The Witness: Mr. Mirman. But up to that time I had no directions.

The Court: But thereafter?

The Witness: Yes.

The Court: Did Mr. Mirman give you directions in connection with your work as a professional accountant?

The Witness: Yes, your Honor.

Mr. Strong: May I ask the witness some questions:

The Court: Yes.

Q. (By Mr. Strong): You were asked whether Mr. Mirman engaged you? Will you state what the conversations were with reference to your being retained? First state when they took place, and who was present.

A. On May 21 I received a telephone call from Mr. Mirman, stating he had a client in his office who was down town, and would like to see me on a tax matter. I was busy, but I told him to come on over, and he did.

Q. Who was present? [992]

Mr. Robnett: What was said after, after they got there is objected to as privileged.

The Court: Objection sustained.

Mr. Strong: As to retaining him; not anything else. There is no evidence here that he was retained as a clerk or secretary, or anything. That is what I want to bring out.

The Court: The evidence shows that at that time Mr. Mirman was the attorney for Sam Ormont.

(Testimony of William S. Malin.)

Mr. Strong: That's right.

The Court: But the directions received by this witness in connection with that matter were given to him by Mr. Mirman.

Mr. Strong: What directions, your Honor?

The Court: Whatever objections he received. That is his testimony.

Mr. Strong: Supposing he told him to go down the hall, as a sole direction.

The Court: Maybe he did, but that would be immaterial anyhow. So if he told him that, it would not be admissible. Excuse me just a moment, and I will see what Professor Wigmore has to say.

Mr. Strong: Also the Code of the State, your Honor, as to privilege.

The Court: "An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of [993] professional employment; nor can an attorney's secretary, stenographer or clerk be examined." Wigmore extends the rule to attorney's clerks, and other agents. "The assistance of these agents being indispensable to his work, and the communications of his client being often necessarily committed to them by the attorney, or by the client himself, the privilege must include all the persons who act as the attorneys' agents."

Mr. Strong: There is no evidence that he acted as the attorney's agent, your Honor.

The Court: There were no other persons present

(Testimony of William S. Malin.)

during the period of this consultation except Mr. Ormont, Mr. Mirman and yourself?

The Witness: That is correct, your Honor.

Mr. Strong: May I be heard further?

The Court: Do you mean you want to ask some more questions?

Mr. Strong: Yes.

The Court: All right.

Q. (By Mr. Strong): Will you state what directions were given to you on this first occasion?

Mr. Robnett: I object to that, if the Court please, as asking for the conclusion of the witness, and as privileged.

Mr. Strong: It is cross-examination, your Honor. He asked about directions.

The Court: Objection sustained. [994]

Mr. Strong: No further questions.

The Court: The witness will be excused.

Mr. Strong: As to this phase of it.

Q. Did you ever meet with the defendant, Sam Ormont, in the presence of someone other than his attorney? A. Yes.

Mr. Robnett: I object to that as incompetent, irrelevant and immaterial, if the Court please; because the matter was privileged to start with, it continued to be privileged.

Mr. Strong: It becomes unprivileged when an outsider comes in.

The Court: Not necessarily so. The objection to the question will be overruled. The answer will stand.

(Testimony of William S. Malin.)

Q. (By Mr. Strong): When was the first occasion when someone else was present besides Samuel Ormont and/or his attorney Mirman?

Mr. Robnett: Objected to as privileged, if the Court please, and as incompetent, irrelevant and immaterial.

The Court: It assumes that there was more than one occasion. Let me hear the question again, please.

Mr. Strong: I will rephrase it.

The Court: All right.

Q. (By Mr. Strong): When was the first occasion, if there was more than one, in which you had a conversation with the defendant when someone other than he and his attorney were present?

A. I believe it was May 22, the day after when——

The Court: No.

Q. (By Mr. Strong): Who was present?

A. Mr. Himmelfarb, Mr. Ormont, and the attorney Mirman.

Q. Where did this conversation take place?

A. At the attorney's house.

The Court: At the attorney's house?

The Witness: Yes, in the evening.

The Court: The attorney was present?

The Witness: Yes.

Q. (By Mr. Strong): Was there any discussion at that time with Ormont as to his income?

Mr. Robnett: I object to that, if the Court please, as privileged, incompetent, irrelevant and immaterial; because the other defendant was present would not change the rule, I don't believe, as to privilege.

(Testimony of William S. Malin.)

Mr. Strong: I don't think it has anything to do with it.

The Court: Not as to Sam Ormont. Objection overruled.

Mr. Katz: On behalf of the defendant Himmelfarb I object as incompetent, irrelevant and immaterial; no foundation laid; hearsay as to him.

The Court: Objection overruled. We will find out by [996] what the question is?

Mr. Katz: If the Court please, may I now examine the witness on voir dire with respect to employment and the relationship to Mr. Mirman of defendant Himmelfarb?

The Court: Yes.

Mr. Strong: We offer this only as to Ormont at this time, to save time.

The Court: It is offered only as to the defendant Ormont. It will be disregarded as to the defendant Himmelfarb?

Mr. Robnett: If the voir dire should develop that it was the same attorney, it would be privileged.

The Court: I think that is right. Go ahead on the voir dire then. [997]

Voir Dire Examination

By Mr. Robnett:

Q. Mr. Malin, I ask you if it isn't a fact that the time or about the time that Mr. Mirman communicated with you with regard to having a client whom he identified afterwards as Mr. Ormont, if he didn't also communicate with you and tell you that there were two clients, Mr. Ormont and Mr.

(Testimony of William S. Malin.)

Himmelfarb that he wanted to confer with you about.

Mr. Strong: Objected to on the ground it calls for a conclusion. He should give the statement of what was said by the attorney, your Honor.

The Court: Objection overruled.

The Witness: Can I have the question.

(The question referred to was read by the reporter, as set forth above.)

The Witness: He didn't say he had two clients; he said he represented both Ormont and Himmelfarb.

Q. (By Mr. Robnett): And he at a later date produced both Mr. Ormont and Mr. Himmelfarb at his home or his office?

A. At his home, for my convenience.

Q. And the two defendants and Mr. Mirman were present? A. Yes, sir.

Q. At that time that was the first time you had met Mr. Himmelfarb, was it? [998]

A. Yes, sir.

Q. Prior to that had Mr. Mirman told you that Mr. Himmelfarb was one of the parties that he wanted to confer with you about?

A. I don't think we had any conversations about that. I wanted to see Mr. Himmelfarb with Ormont and asked him if he could arrange it and he said yes, he represented—I don't know whether he used the word "represents"—but he said yes, he could arrange it.

Q. He did tell you, Mr. Mirman did tell you, did

(Testimony of William S. Malin.)

he not, at a time when he produced Mr. Himmelfarb that he represented both Mr. Ormont and Mr. Himmelfarb? A. Yes.

The Court: Did you thereafter perform any work in connection with the income accounting or such matters with relation to the defendant Himmelfarb?

The Witness: With relation to both of them.

The Court: With relation to both of them?

The Witness: Yes, sir.

The Court: From whom did you receive what directions you received in that connection?

The Witness: From Mr. Mirman.

The Court: From Mr. Mirman?

The Witness: Yes, sir.

Mr. Strong: May I object to that on the ground that [999] it doesn't state what the directions were and that the directions had nothing to do with the subject matter.

The Court: I think under such a circumstance as this there would be no need of having the rule of privilege if you could compel a witness to testify to what the conversation was. The objection is overruled. That is, Mr. Strong's objection.

You were examining on voir dire, Mr. Robnett.

Mr. Strong: May I ask a question on voir dire?

The Court: Yes.

Q. (By Mr. Strong): From whom did you receive a fee in this case?

Mr. Robnett: Objected to as incompetent, ir-

(Testimony of William S. Malin.)

relevant and immaterial, if the Court please. This matter is still privileged.

The Court: Objection sustained.

Mr. Strong: No further questions on voir dire.

Direct Examination

(Continued)

By Mr. Strong:

Q. Was there any occasion when you had a conversation with the defendant Sam Ormont with or without his attorney being present and with or without Mr. Himmelfarb being present when there was still another person present?

A. Well, no—does the time make any difference?

Q. Just answer yes or no.

The Court: He wants to know if there was ever any time. [1000]

The Witness: Mr. Bircher was present.

Q. (By Mr. Strong): When?

A. When they were conducting their examination.

Q. Where did that conversation take place?

A. I believe one was in South Gate at the plant.

Q. Who was present at that conversation?

A. Mr. Ormont, Mr. Bircher and Mr. Phoebus. I am not too sure whether Mr. Bircher was present the second time. There was a Mr. Phoebus and a Mr. Schlick. They probably can refresh my memory.

Q. No, just your own memory as to who was present.

(Testimony of William S. Malin.)

A. I believe Mr. Bircher and Mr. Phoebus were there.

Q. What was the date of this conversation?

A. That would be awfully hard for me to remember. It was some time during their examination, maybe in June.

Q. What year? A. 1945.

Q. Where did the conversation take place?

A. In the plant at South Gate.

Q. Whose plant?

A. The Acme Meat Company.

Q. Did you have any conversations with the defendant Ormont at any other time when anybody else besides Mr. Ormont or his attorney or Mr. Himmelfarb was present? [1001]

A. When anybody else was present?

Q. Yes, somebody else besides them.

A. I don't recall of any.

Q. I show you Government's Exhibit 42 for identification and ask you if that is in your handwriting.

A. Yes, sir. The first page is.

Q. Will you look at the others?

A. Yes, sir, these are all in my handwriting.

Q. Did you prepare that list?

A. Yes, I did.

Q. Where did you prepare it?

A. At the bank on Soto and Brooklyn Avenue.

Q. What is that a list of?

A. That is a list of contents of a safe deposit box.

(Testimony of William S. Malin.)

Q. Who was present, if anyone?

A. Mr. Bircher, Mr. Phoebus, I believe Mr. Schlick was present, and Mr. Ormont.

Q. Whose box was it?

A. Mr. Ormont's box.

Q. What did you list on Government's Exhibit 42 for identification?

A. I listed——

Mr. Robnett: I object to this as incompetent, irrelevant and immaterial, that the bonds and the contents of the box would be the best evidence, and it is a conclusion of the [1002] witness as to what is listed. Also it is privileged.

The Court: The question of privilege, the objection on the ground or privilege is overruled. On the other ground, the defendant Ormont was present, you say, when you made that list?

The Witness: I believe he was. We couldn't get into the box without him.

The Court: The objection is overruled.

Mr. Strong: May we have the question read?

(The question referred to was read by the reporter, as follows:

("Q. What did you list on Government's Exhibit 42 for identification?")

The Witness: Is it all right to answer?

Q. (By Mr. Strong): What was it?

A. A list of the bonds, savings and war bonds in the box, in that safe deposit box.

Mr. Strong: I offer Government's Exhibit 42 for identification in evidence.

Mr. Robnett: To which I object, if the Court

(Testimony of William S. Malin.)

please, on the ground it is incompetent, irrelevant and immaterial, not the best evidence, no proper foundation has been laid. The contents of the bonds themselves would be the best evidence. And this exhibit shows on its face that there are other [1003] people interested in those bonds that are listed there on that exhibit and there is no evidence in this case to show that they were all or any of them were Mr. Ormont's bonds.

The Court: The objection is overruled. Exhibit 42 is admitted in evidence.

Mr. Katz: As against the defendant Ormont only?

The Court: As against the defendant Ormont only.

(The document referred to was received in evidence and marked Government's Exhibit No. 42.)

Mr. Strong: May we at this time recess for lunch?

The Court: Motion granted. Recess until 2:00 o'clock. Remember the admonition.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m., of the same date.)

Los Angeles, California, Friday, June 6, 1947

2:00 P.M.

The Court: The usual stipulation?

Mr. Strong: The usual stipulation.

Mr. Katz: Yes.

Mr. Robnett: So stipulated.

Mr. Strong: May I have these marked for identification, your Honor?

The Court: 50?

The Clerk: That's right, your Honor.

Mr. Strong: May I separate these pages, your Honor?

The Court: You have marked several pages differently now?

Mr. Strong: Yes, your Honor. I will read off how they are marked. 50 for identification is a series of four pages, the first one having the first item, "Phillip Himmelfarb" on the top of it.

The Court: The other is of another batch?

Mr. Strong: Another batch, and it says: "Sam Ormont."

The Court: We will call that 51.

Mr. Strong: And the envelope is 52.

The Court: 52.

(The documents referred to were marked Government's Exhibits 50, 51 and 52 for identification.)

WILLIAM S. MALIN

the witness on the stand at the time of the adjournment, being previously duly sworn, resumed the stand and testified as follows:

Direct Examination
(Continued)

By Mr. Strong:

Q. I show you Government's Exhibits 50, 51 and 52 for [1008] identification, and ask you if you ever saw those before.

A. Yes, they are very familiar. That's 50. This looks familiar, Mr. Strong.

Q. I show you Government's Exhibit 52 for identification. Did you have this envelope prepared, or did you prepare it?

A. That is my envelope.

Q. Did you mail it, as shown, to Mr. Donald Bircher?

A. I imagine I did, Mr. Strong.

Q. I want to know whether you did or did not?

A. Yes. It is my envelope.

Q. What was contained in that envelope?

A. I don't know. Probably one of these.

Mr. Katz: I object to one of these, as a conclusion of the witness. He stated he did not know.

Q. (By Mr. Strong): I show you Government's Exhibit 50? Did you ever send this to Mr. Bircher?

Mr. Katz: Objected to upon the ground that it is incompetent, irrelevant and immaterial; no foundation laid; it does not come within the confines or encompass the privilege rule; no corpus delicti

(Testimony of William S. Malin)

established as against the defendants, and it has no bearing on any of the issues of the case.

Mr. Robnett: I object on behalf of Mr. Ormont as hearsay evidence, incompetent, irrelevant and immaterial [1009]

The Court: Let me see it.

Mr. Strong: Show it to the Judge.

The Court: Have you finished looking at it?

The Witness: Yes.

The Court: Your question is: Did you ever send this?

Mr. Strong: Both 50 and 51.

The Court: To Mr. Bircher?

Mr. Strong: Yes.

The Court: The objection on behalf of the defendant Himmelfarb,—will you state that again?

Mr. Katz: I object upon the ground, if the Court please, that no foundation has been laid; it is incompetent, irrelevant and immaterial; no corpus delicti established; not within the issues of this case, and a privilege encompassed within and defined by the privilege rule.

The Court: And the Ormont objection?

Mr. Robnett: Your Honor, do I understand there are two exhibits offered, 50 and 51?

The Court: Yes.

Mr. Robnett: As to 50, I object upon the ground that it is hearsay as to Mr. Ormont; incompetent, irrelevant and immaterial; a privileged communication; and as to 51, that that is a privileged communication, and we claim the privilege. And it is

(Testimony of William S. Malin)

incompetent, irrelevant and immaterial, and further that as to 51, pages 1 and 2 are especially privileged, and probably [1010] the last page. These three pages are privileged as to Mr. Ormont, and I want to make a separate objection upon the ground of privilege as to each part of that exhibit on pages 1, 2, 3 and 4.

Mr. Katz: I did not understand the question was directed to Exhibit 51 as well as 50. If it is, I object to it.

The Court: You are offering both, Mr. Strong?

Mr. Strong: Yes.

Mr. Katz: And as to 51, I object upon the ground that it is hearsay as to the defendant Himmelfarb.

The Court: The objection as to 50, so far as the defendant Ormont is concerned, is sustained upon that ground that it is hearsay; and the objection as to 51 as to the defendant Himmelfarb is sustained upon the ground that it is hearsay. Otherwise the objections are overruled. In other words, the question: "Did you ever send these to Mr. Bircher" as to 50 is admissible if the witness answers yes, as against Himmelfarb, and as to 51 it is admissible as against Ormont.

Q. (By Mr. Strong): What is your answer as to whether you sent these to Mr. Bircher?

A. I know that I had sent statements to Mr. Bircher. The balance sheets——

Q. Look at these, and see if you sent these to Mr. Bircher. [1011]

Mr. Katz: I move to strike the answer of the witness as to the defendant Himmelfarb.

(Testimony of William S. Malin)

Mr. Robnett: I join in the motion.

The Court: The motion is granted. The question, however, remains: Look at these, and see if you sent these to Mr. Bircher.

Mr. Katz: As they are there?

Mr. Strong: Yes.

The Witness: Mr. Strong, can I take these separately? I am a little confused here. [1012]

Mr. Strong: Well, take your time and take them separately.

The Witness: I know the balance sheet, I prepared that from information that they gave me.

Mr. Strong: Which is the balance sheet?

The Court: If you maintain they were sent to Bircher why do you not put him on the stand? Go ahead.

Mr. Katz: If the Court please, with respect to this voluntary statement of the witness as to what he prepared, we move to strike that as not responsive.

Mr. Robnett: I join in that motion.

The Court: I didn't know he had said anything. He asked if he could take them apart.

Mr. Robnett: He did make some statement.

The Court: The jury is instructed to disregard it if they heard it.

Mr. Strong: What did he say? I didn't hear it.

The Court: Whatever it is, it is stricken.

Now you are taking apart Exhibit 50?

Mr. Strong: Yes. I would like to have these marked 50-A, B, C, and D.

The Court: Very well.

(Testimony of William S. Malin)

(The documents referred to were marked Government's Exhibits Nos. 50-A, 50-B, 50-C and 50-D for identification.)

Mr. Strong: May I have the same thing done with 51, to [1013] make it 51-A, B, C and D?

The Court: So ordered.

(The documents referred to were marked Government's Exhibits Nos. 51-A, 51-B, 51-C and 51-D for identification.)

Mr. Katz: May it please the Court, in order that the objections heretofore interposed to the questions with respect to Exhibit 50 for identification, I would like to interpose them to 50-A, B, C and D as now constituted.

Mr. Robnett: The same would be true of our objections, your Honor.

The Court: It will be so understood. The objections are overruled.

Q. (By Mr. Strong): I show you Government's Exhibits 50-A and 50-B for identification. Did you send those to Mr. Bircher?

A. I believe I did.

Q. And that signature on 50-B, did you see that put on there? A. Yes, sir.

Q. Who wrote it there?

A. Mr. Himmelfarb.

Q. The defendant Himmelfarb?

A. Yes, sir.

Q. I show you Government's Exhibits 51-A and 51-B, and ask you if you sent those to Mr. Bircher.

A. I believe I did.

(Testimony of William S. Malin)

Q. And the signature on 51-A, did you see that put on there? A. I believe I did.

Q. Did you or didn't you?

A. I think I did.

Q. Who wrote it? A. Mr. Ormont.

Mr. Robnett: Move to strike the answer, your Honor.

The Court: The answer may be stricken.

Q. (By Mr. Strong): Did you see it or didn't you, Mr. Witness?

A. It is awfully hard to remember. I would say yes.

The Court: You mean that is your best recollection?

The Witness: That is my best recollection, your Honor.

The Court: Who wrote it?

The Witness: Mr. Ormont.

The Court: The defendant?

The Witness: Yes, sir.

Mr. Strong: I offer in evidence Government's Exhibits 50-A, 50-B, 51-A and 51-B.

Mr. Katz: If the Court please, with respect to 50-A and 50-B, I interpose the objection that there is no foundation laid, incompetent, irrelevant and immaterial, that the matters set forth therein are embraced within the privilege [1015] communication rule, and not within the issues of the case, and no corpus delicti has yet been established, also subsequent in time to the offense included within the indictment as against the defendant Himmelfarb.

The Court: That is 50?

(Testimony of William S. Malin)

Mr. Katz: That is Exhibit 50. Now with respect to 51-A and 51-B, those matters are subject to the same objection, plus the fact that they are hearsay as to Himmelfarb.

The Court: As to 51-A and 51-B as to the defendant Himmelfarb the objection is sustained.

As to 50-A and 50-B the objection is overruled as to the defendant Himmelfarb.

Mr. Robnett: I wish to interpose the objection to 50-A and 50-B.

The Court: As to 50-B, that relates to Himmelfarb?

Mr. Robnett: On the ground that they are hearsay as to the defendant Ormont.

The Court: The objection is sustained as to the defendant Ormont.

Mr. Robnett: As to 51-A and 51-B, I object on the ground that they are confidential communications and are within the rule prohibiting their use because this witness was an agent for the attorney of Mr. Ormont at the time, and that in addition thereto they are subsequent to all charges in the indictment and do not tend to prove or disprove anything in the [1016] issues in the indictment, the indictment in this case being for the year 1944 and the years prior. These are taken long after in 1945.

The Court: The objection is overruled as to 51-A and 51-B as to the defendant Ormont.

Incidentally, there isn't any foundation as to when they were sent?

(Testimony of William S. Malin)

Mr. Strong: May we have the envelope, your Honor? That will show it.

(The document referred to was passed to counsel.)

Mr. Strong: I offer in evidence the envelope as Government's Exhibit 52.

(The envelope referred to was marked Government's Exhibit No. 52 for identification.)

The Court: There is no foundation. There is no testimony as to what was in the envelope.

Mr. Strong: I thought he said he sent these in the envelope.

Mr. Robnett: We object on the ground there is no foundation laid.

Q. (By Mr. Strong): When were they sent, Mr. Witness? A. May I see the envelope?

Q. To refresh your recollection?

A. Yes. [1017]

Q. This is Exhibit is Exhibit 52 for identification.

A. July 31st.

Q. What year? A. 1945.

Q. When were those statements prepared, 51-A and 51-B and 50-A and 50-B?

Mr. Robnett: I object to that on the ground it is incompetent, irrelevant and immaterial.

Mr. Katz: Same objection heretofore made, if the Court please, if I may make it that way without restating it.

The Court: Overruled.

The Witness: Is there a date on that statement?

(The document referred to was passed to the witness.)

(Testimony of William S. Malin)

Q. (By Mr. Strong): I will show you 50-A.

The Court: The approximate date of their preparation, Mr. Witness. I don't think counsel means for you to give the precise moment.

The Witness: It is dated July 30, 1945.

The Court: The objections are overruled and the documents are admitted in evidence as I have indicated; that is to say, 50-A and 50-B as admitted as against the defendant Himmelfarb only and 51-A and 51-B as against the defendant Ormont only.

(The documents referred to were received in evidence and marked Government's Exhibits Nos. 50-A, 50-B, 51-A and 51-B.)

Mr. Katz: May we interpose an objection to Exhibit 52, if the Court please?

The Court: I thought you did.

Mr. Katz: Not with respect to the admission of Exhibit 52.

The Court: Very well.

Mr. Katz: With respect to that, if the Court please, we still feel that there is no foundation laid and I object to it on that ground.

Mr. Robnett: We join in that objection.

The Court: Sustained. There is no foundation laid.

Mr. Strong: No objection, if the Court please.

Mr. Katz: I now move to strike Exhibit 50 on the ground that there is no foundation laid for its admission, as well as on the grounds previously stated.

(Testimony of William S. Malin)

Mr. Robnett: I join in the objection and also make the same objection to 51-A and 51-B.

The Court: Overruled.

Q. (By Mr. Strong): I now show you Government's Exhibit 51-C for identification and ask you if you ever sent that to Mr. Bircher, ever mailed it to him. A. Yes.

Q. The name in ink, Sam Ormont, did you see that [1019] placed on that document?

A. I would say yes. I am not sure that I did, but that is his signature and I know I prepared this, helped to prepare it. Mr. Bircher wanted the information and I prepared it and Mr. Ormont signed it.

Mr. Robnett: Move to strike as not responsive and only an opinion of the witness.

Mr. Strong: He said, I said yes.

Mr. Robnett: But he went on and said he wasn't sure.

The Court: No, he didn't say he wasn't sure; he said he prepared it at Mr. Bircher's request and then had Mr. Ormont sign it and sent it to Mr. Bircher.

The Witness: That is right.

The Court: The motion to strike the answer is denied.

Q. (By Mr. Strong): I show you Government's Exhibit 50-D for identification and ask you whether you prepared this, had it signed and sent to Mr. Bircher.

The Court: What was the other one?

(Testimony of William S. Malin)

Mr. Strong: 51-C. This is 50-D.

The Witness: That is correct.

The Court: What is correct.

The Witness: That I prepared it and Mr. Himmelfarb signed it. That is his signature.

Mr. Katz: I didn't get the answer. [1020]

The Witness: The same answer respecting Himmelfarb and Mr. Ormont, that is, that at Mr. Bircher's request I prepared this and Mr. Himmelfarb signed it.

Mr. Strong: I now offer in evidence Government's Exhibit——

Mr. Robnett: Pardon me.

The Court: And what happened to it?

The Witness: Judging by the date they were both sent in at the same time.

The Court: Did you send it to Bircher?

The Witness: Yes, I feel I did.

The Court: You feel you did?

The Witness: Yes.

The Court: You caused it to be sent?

The Witness: I caused it to be sent. That is more accurate.

Mr. Robnett: May I see them, please?

(The documents referred to were passed to counsel.)

Mr. Strong: I offer in evidence Government's Exhibit 50-D for identification and 51-C for identification.

Mr. Robnett: As to the witness' answer on 50-D, your Honor, that was not admitted—I mean no

evidence has been admitted as to Mr. Ormont on that, and I want to move to strike the answer to interpose an objection on Mr. Ormont's part that it is all hearsay as to Mr. Ormont. I interpose that objection [1021] to it as far as these are concerned.

The Court: As to Exhibit 50-C?

Mr. Robnett: 50-D.

The Court: 50-D?

Mr. Robnett: Yes.

The Court: The objection is sustained as to the defendant Ormont.

As to 51-C, the objection is sustained as to Himelfarb on the ground in each instance that they are hearsay.

Mr. Robnett: I want to make a further objection on behalf of Mr. Ormont as to 51-C on the ground that it is incompetent, irrelevant and immaterial, and this is a privileged communication which the witness received from Mr. Ormont through Mr. Ormont's attorney, and it is therefore a privilege. [1022]

Mr. Katz: With respect to 50-D, if the Court please, we have objected upon the ground that there is no foundation laid; no corpus delicti has been established; it is incompetent, irrelevant and immaterial, and not within the issues in this case.

The Court: Other than as I have just indicated, the objections are overruled.

Q. (By Mr. Strong): Showing you Government's Exhibit 51-A, which is the statement signed by Sam Ormont, where did you get the information which is contained on that document?

Mr. Robnett: I object, if the Court please, upon the ground that it is incompetent and immaterial and also privileged, where he got the information; and the exhibit speaks for itself.

The Court: If the exhibit speaks for itself——

Mr. Strong: It doesn't, your Honor.

The Court: The objection of privilege is not good. Do you want to object to this too? I will be thinking about both of them at the same time.

Mr. Katz: If the Court please, this is one that is not within the rule. It is 51.

The Court: Objection overruled. Where did you get the information for the data on this sheet?

A. I got the information from the taxpayer's records, [1023] the taxpayers' records.

Mr. Strong: Give the name.

A. Mr. Ormont. The cash in bank I got from the bank balance; and the cash on hand is what Mr. Ormont estimated he had on hand on April 30, 1945. Government bonds I got from the inventory we took of the Government bonds, of which we have a list. The capital account of the Acme Meat Company was from the books at that date. The next item is profits, January 1st, 1945, to April 30, 1945. I don't know where that was from. That was probably accumulated profit of the Acme Meat Company for the first four months.

The Court: Where did you get the information?

The Witness: From the books, your Honor, from the books of the Acme Meat Company.

Mr. Robnett: I move to strike the answer, if the Court please, and also to strike the exhibit it-

(Testimony of William S. Malin)

self, 51-A, upon the ground that it is now shown that all of this information was obtained by this gentleman while he was employed by the attorney for Mr. Ormont, and as agent for that attorney, and it is, therefore, privileged, and was privileged, and it is improper to admit it at this time.

The Court: He lost the privilege when he disclosed it to Government agents. Objection overruled. Motion to strike denied. [1024]

Q. (By Mr. Strong): Mr. Witness, I show you Government's Exhibit 50-B, which is a sheet with the name "Phillip Himmelfarb" on the top, and ask you where you got that information.

Mr. Katz: Objected to, if the Court please, upon the ground that it is incompetent, irrelevant and immaterial, and calls for the conclusion of the witness; that it is within the confines of the privilege rule; no foundation has been laid; and it has not been established that there was any authority and direction to deliver that to any person at any time at any place. No corpus delicti has been established.

The Court: Overruled.

Mr. Robnett: I object to it on behalf of Mr. Ormont as hearsay.

The Court: Let me see that? That objection is overruled. Sustained as to Ormont.

A. I got this from Mr. Himmelfarb. The cash on hand is the amount he had deposited in bank; that is, the \$22,000 odd dollars. Cash in banks, I got from bank balances.

(Testimony of William S. Malin)

The Court: Just a minute. You said you mailed that to Mr. Bircher?

The Witness: I believe I did.

The Court: Were all these documents mailed at the same time?

The Witness: I think they were. They were dated July 30th. [1025] They must have been.

The Court: Is that your best recollection?

The Witness: Yes.

The Court: Your answer is no, or you don't remember, or what?

The Witness: It is my best recollection they were.

The Court: That they were mailed at one time?

The Witness: Yes.

Mr. Strong: Go ahead.

The Witness: The war bonds were bonds he had at cost; and the four family flat, and all of these assets, automobile, truck, adding machine, came from his records; and the Acme Meat Company receivables is what he said was receivable from the Acme Meat Company. I believe it was salaries accrued, and the liabilities, small items there, were what he told me he had owed.

Q. By "he" you mean who?

A. Mr. Himmelfarb.

Mr. Katz: I move to strike the portion of the answer that it is a communication from the defendant Himmelfarb to the witness.

The Court: Objection overruled. The witness has testified that Mr. Himmelfarb signed that, and

(Testimony of William S. Malin)

it was sent at the same time as the other, with his letter, which was addressed to Mr. Bircher. [1026]

Q. (By Mr. Strong): I will show you Government's Exhibit 51-C, and ask you where you got the information contained in that letter.

Mr. Robnett: Same objection as I have interposed to 51-A, if the Court please.

The Court: Let me see it. Did you say you prepared that?

The Witness: Yes, I did. Mr. Bircher asked me to answer certain——

The Court: Did you prepare that?

The Witness: Yes, sir.

The Court: Mr. Ormont sent it?

The Witness: Yes. But I submitted this to the attorney first, because there were some—I don't know whether I am responsive or not——

The Court: I think you had better not do any more than respond to the question. Now will you state the objection, Mr. Robnett?

Mr. Robnett: I object upon the ground that it is a privileged communication, and there is no authority shown to this witness to divulge the things contained therein, or to transmit the letters and documents to Mr. Bircher, or anyone else. The only authority he got was through the attorney, who was attorney for Mr. Ormont. It is privileged.

The Court: Objection overruled.

Q. (By Mr. Strong): Will you state where you got the information which [1027] you put into this letter which you have before you?

(Testimony of William S. Malin)

The Court: Did you state as one of your grounds that it was immaterial?

Mr. Robnett: Yes.

The Court: Objection sustained.

The Witness: What do you want me to do, your Honor?

The Court: The objection is sustained. It is immaterial where he got it.

Mr. Strong: I would like to try to break down a privilege by showing where he got it, and continue from there.

The Court: It is immaterial.

Mr. Strong: To break down a privilege?

The Court: It is immaterial. I have already ruled against the privilege and held that is not privileged.

Q. (By Mr. Strong): I show you Government's Exhibit 6, and ask you if you prepared the original of this income tax return, which is the return for the year 1944, for Sam Ormont and Phillip Himmelfarb?

Mr. Robnett: I submit that is a misstatement of facts.

Mr. Strong: I did not state any facts. I asked a question.

Mr. Robnett: Then he assumes a fact not in evidence in this case, that it was a return for the year 1944. I don't believe it is. I think it is a return for the fiscal year. [1028]

Mr. Strong: The return which bears in the

(Testimony of William S. Malin)

upper right-hand corner the figures 1-9-44, simply to designate what it is.

The Court: The jury will disregard the remarks and statements. It is Exhibit No. 6. That is sufficient identification.

Q. (By Mr. Strong): Did you prepare Government's Exhibit 6? A. Yes.

The Court: The original of which that is a photostatic copy?

The Witness: I did, yes.

Q. (By Mr. Strong): And that is your signature on the last page, William F. Malin?

A. Yes, sir.

Q. And the statement on this return, Government's Exhibit 6, next to the words: Business or Profession; it says: Miscellaneous Enterprises. Where did you get that information?

A. I got that from——

Mr. Robnett: I object as immaterial, incompetent and irrelevant and privileged.

The Court: Overruled on the ground of privilege. Sustained on the ground that it is immaterial.

Mr. Strong: May I be heard on that, your Honor; just a [1029] few words?

The Court: You have got to have a very good idea.

Mr. Strong: I will try to get it across.

The Court: I have overruled the question of privilege. The defendant signed it?

Mr. Strong: Yes.

(Testimony of William S. Malin)

The Court: What difference does it make where he got the information?

Mr. Strong: We are trying to prove what the income was for the year 1944, and submit that is material.

The Court: Where he got the information?

Mr. Strong: Yes, your Honor. He prepared it.

The Court: Objection sustained upon the ground that it is immaterial. Just a minute. I will reverse myself on the ground that it is immaterial. It is material, because of the element of wilfulness in the charge.

Mr. Strong: I will add that as one of my reasons.

The Court: I have already reversed myself, so you may answer the question: Where did you get the information?

The Witness: What is the question?

Q. (By Mr. Strong): Where did you get the information which is inserted here: Miscellaneous Enterprises. Where did you get that information?

A. From the attorney, Mr. Mirman. [1030]

Mr. Robnett: I move to strike the answer, if the Court please, upon the ground that it is not binding upon this defendant, and would be hearsay.

The Court: Overruled. Motion denied.

Mr. Katz: If the Court please, I interpose the objection, and move to strike upon the ground that it is a privileged communication. The signing of a document disclosing the information contained

(Testimony of William S. Malin)

therein, does not waive the privilege of the source from which the information was obtained.

Mr. Robnett: I would like to join in that.

The Court: Motion denied. [1031]

Q. (By Mr. Strong): I show you this item here on the front page, item 12 on the return says, "other income, state nature of income," and then the words, "miscellaneous income, \$71,388.84." Where did you get that information?

Mr. Robnett: Object to that as having been asked and answered.

Mr. Strong: No, that wasn't the same question, your Honor.

Mr. Robnett: He asked him about the item under miscellaneous income.

Mr. Strong: No, I asked about miscellaneous enterprises, which is another line on top.

Mr. Robnett: Same objection to this question as interposed to the other.

The Court: Objection overruled.

Mr. Katz: Also my same objection, your Honor.

The Court: Overruled.

The Witness: Same answer.

The Court: From the attorney?

The Witness: From the attorney.

Q. (By Mr. Strong): Now this information contained on the fourth page of this document, which shows the words which are shown to be typed in, "Sam Ormont, 50 per cent, \$35,694.42," and then the [1032] address for Sam Ormont, then the name "Phillip Himmelfarb, 50 per cent, \$35,-

(Testimony of William S. Malin)

694.42," and the address of Phillip Himmelfarb, where did you get that information?

Mr. Robnett: I object to that and as to the last one as to Himmelfarb because it is hearsay as to Mr. Ormont.

The Court: The ruling will be the same. The objections are overruled except that which relates to Himmelfarb will not be admitted against Ormont and that which relates to Ormont will not be admitted against Himmelfarb.

Mr. Strong: May I be heard on that at this point?

The Court: Not now.

Mr. Strong: I think I may be able to change your Honor's ruling if I might be heard for a moment.

The Court: Not now.

Q. (By Mr. Strong): Will you answer? Where did you get that?

A. That is the division of the income 50-50.

The Court: No. Strike that. Where did you get the information?

The Witness: You are now referring to Schedule L, the division of the profits?

Mr. Strong: Yes.

The Witness: Which is the division of the income according to their statements to me that they divided it 50-50.

Mr. Strong: That is what I want to know.

Q. Now I show you on the fourth page under the section headed "Questions," the second item

(Testimony of William S. Malin.)

where it is printed, "nature of organization (partnership, syndicate, pool, joint venture, etc.);" and then there is typed in the words "joint venture," where did you get the information that this was a joint venture?

A. I used that word "joint venture." It wasn't a partnership. I got it from the statements to me that it was.

The Court: A joint venture?

The Witness: A joint venture.

The Court: Who gave you the information? That is what he wants to know.

The Witness: Each of the defendants.

Q. (By Mr. Strong): When was that?

A. I think it was May 23.

Q. Where was that?

A. In the South Gate plant.

Q. Who was present?

A. Mr. Ormont and later Mr. Himmelfarb, but I spoke to Mr. Ormont first.

Q. Was that the first date on which the term "joint venture" was used between either you or Mr. Ormont or Mr. Himmelfarb or all three?

A. Yes, sir. [1034]

Mr. Robnett: I object to that, if the Court please, that whatever conversations they had were a privilege.

The Court: That objection is sustained. At least I do not mean whatever objections they had but as to this conversation.

Mr. Robnett: Yes, your Honor.

(Testimony of William S. Malin.)

Q. (By Mr. Strong): Anybody else present that day besides you?

A. No. There was a bookkeeper in the next room.

Q. Was the door open?

A. Yes, I guess it was.

Q. Could he hear what was said, do you know?

Mr. Robnett: I move to strike out the answer as a guess. He said he guessed it was.

The Court: It may be stricken.

There is an unanswered question, could he hear what you said.

Mr. Katz: That is objected to as calling for a conclusion and opinion of the witness. Objected to on that ground.

The Court: Objection sustained.

Q. (By Mr. Strong): Mr. Witness, as to these sums that are shown here of 50 per cent, \$35,694.42 to Sam Ormont, 50 per cent for \$35,694.42 to Phillip Himmelfarb, did you see any records with reference to those sums? [1035]

Mr. Robnett: Objected to as incompetent, irrelevant and immaterial, also that it is privileged.

The Court: The question calls for a yes or no answer, and in view of that the objection is overruled.

The Witness: Well, yes.

Q. (By Mr. Strong): Did you see regular books and records? A. No, sir.

Mr. Robnett: Object to that as asking for an opinion of the witness.

(Testimony of William S. Malin)

The Court: Objection sustained.

Q. (By Mr. Strong): What did you see?

A. A slip of paper on which was written——

Mr. Robnett: I object to that, if the Court please, on the ground that it is privileged and incompetent, irrelevant and immaterial, also leading and suggestive.

The Court: There is no foundation laid as to when he saw it, who was present, and so forth.

Q. (By Mr. Strong): When did you see it?

Mr. Robnett: I object to that.

The Court: He said he saw a piece of paper.

Mr. Robnett: I know. I object to this question as immaterial. [1036]

Mr. Strong: It is foundation. He said there was no foundation.

The Court: Objection overruled.

The Witness: What was the question?

The Court: When did you see the slip of paper?

The Witness: May 23rd.

Q. (By Mr. Strong): Was that the only thing you saw, was a slip of paper? A. Yes, sir.

Q. What did it say on it?

Mr. Robnett: Object to that as the paper would be the best evidence; incompetent, irrelevant and immaterial, and privileged.

Mr. Strong: I will withdraw the question at this point.

The Court: Very well.

Q. (By Mr. Strong): Have you got the paper?

A. No, I haven't.

(Testimony of William S. Malin.)

Q. Do you have any work papers that you worked with? A. No, I haven't.

Q. Did you have?

A. I did have; yes, sir.

Q. Where are they?

Mr. Robnett: Object to that as immaterial.

The Court: Objection sustained.

Q. (By Mr. Strong): Did you make a copy of what is on the paper?

Mr. Robnett: I object to that as immaterial.

The Court: Objection sustained.

Mr. Strong: May I have one moment, your Honor? I may be finished with this witness.

Q. Does Government's Exhibit 6, which bears two signatures on the fourth page, were those placed on the document in your presence?

A. Yes, sir.

Mr. Robnett: That we object to as immaterial also.

The Court: Overruled.

Q. (By Mr. Strong): The signature of Sam Ormont, who signed that?

A. Mr. Sam Ormont.

Mr. Robnett: I will stipulate that Mr. Ormont signed that.

Mr. Strong: Same stipulation?

Mr. Robnett: I say I will so stipulate.

Q. (By Mr. Strong): As to the signature of Phillip Himmelfarb?

A. The defendant Himmelfarb signed it.

(Testimony of William S. Malin)

Mr. Katz: We stipulate that the defendant Himmelfarb signed it, your Honor. [1038]

The Court: You stipulate the defendant Himmelfarb signed it?

Mr. Katz: Yes, your Honor.

The Court: Very well.

Mr. Strong: No further questions.

Mr. Robnett: I have no questions.

Mr. Katz: No questions, your Honor.

The Court: Step down.

(Witness excused.)

Mr. Strong: May we have a recess before I start the next witness? It is almost 3:00 o'clock.

The Court: Very well. Short recess. Remember the admonition.

(Short recess.) [1039]

The Court: The usual stipulation?

Mr. Strong: So stipulated.

Mr. Robnett: So stipulated.

Mr. Katz: Yes.

The Court: Mr. Bircher.

DONALD BIRCHER

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Donald Bircher.

The Clerk: Your address?

The Witness: Glendale, California.

Direct Examination

By Mr. Strong:

Q. Mr. Bircher, what is your occupation?

A. Special agent, Bureau of Internal Revenue.

Q. How long have you had that job?

A. 20 years.

Q. Where are you located?

A. Los Angeles.

Q. During May, 1945, were you assigned to conduct an investigation as to the income tax of Sam Ormont and Phillip Himmelfarb?

A. I was.

Q. For what year? [1040]

A. For the year 1944 originally.

Q. Did you get any further assignment later?

A. Yes, subsequently.

Q. When?

A. Later in 1945 I was assigned to co-operate with Special Agent Phoebus and Internal Revenue Agent Eustice, to cover the years 1942, 1943 and 1944.

Q. Did you have any discussions in connection

(Testimony of Donald Bircher.)

with that investigation, with the defendants Ormont and Himmelfarb, during May, 1945?

A. Yes.

Q. Speak up a little louder. A. Yes.

Q. When was the first such conversation?

A. May 23, 1944, at the Acme Meat Company's office. I talked with——

Q. What date?

A. May 23, 1945, at the Acme Meat Company's office, Imperial and Garfield Boulevards, South Gate. We talked with Mr. Ormont—that is, Mr. Phoebus and I.

Q. That was the day and the occasion which was heretofore testified to by Mr. Phoebus?

A. Yes.

Q. And on that occasion, as I understand Mr. Phoebus' testimony, you did not warn the defendant as to his rights, is [1041] that right?

A. That is correct, I believe.

Q. When was the next time that you had a conversation with either or both defendants?

A. The following day, May 24, Mr. Ormont——

Q. What date?

A. May 24, 1945, Mr. Ormont came to our office.

Q. Where?

A. Room 844 in the Post Office Building, here.

Q. Who was present besides you and Mr. Ormont?

A. Walter E. Slick, Deputy Collector; Mr. Phoebus and Mr. Slick were both Deputy Collectors.

Q. And Mr. Ormont? A. Yes.

(Testimony of Donald Bircher.)

Q. Did you, on that occasion, warn Mr. Ormont as to his constitutional rights?

Mr. Robnett: I object to that as leading and suggestive.

The Court: Objection sustained.

Q. (By Mr. Strong): What did you say on that occasion?

The Court: With relation to the rights of the defendants. A. I told Mr. Ormont——

Mr. Katz: If the Court please, we make the objection that it is hearsay against the defendant Himmelfarb. May it be understood that that objection and ruling continues? [1042]

The Court: Objection sustained as to the defendant Himmelfarb as to this conversation.

A. I told Mr. Ormont that we would like to discuss his income tax liability and income tax affairs with him, and that he had the right to be accompanied by an attorney, and have the counsel of an attorney, if he desired. That he was not required to give us any testimony; and that any statements he made, or documents he produced, at that interview, might be used in court against him in some matter at some future time. And he asked specifically whether any statements he made to us might become knowledge available to certain other Government agencies. And I told him that normally any information given the Internal Revenue Department would be held in confidence by that department, but that if a criminal trial should follow, such information might be disclosed at any

(Testimony of Donald Bircher.)

such trial; and I asked him if he cared to have an attorney present, and he said that he did not care to have one; he did not think he needed one in order to tell the truth. He said he did not want to have any trouble; that he wanted to pay whatever was due the Government. He said that he had made quite a large sum of money. [1043]

Q. Wait a minute now. I am asking you as to what you said to him as to his constitutional rights and you have answered that.

Now will you state what was said by Mr. Ormont in that interview, what questions were asked him, what answers were given by him, with reference to his income for the period that you were investigating?

A. Mr. Ormont stated that he and Mr. Himmelfarb had had an indefinite business arrangement which was somewhat similar to a partnership or joint venture business, but that he did not want it commonly known that they had had such an arrangement because of fear that some other government agency might cause him embarrassment; he said that he had been receiving certain subsidy benefits to which benefits some other government agency might challenge his right since he had represented to the other agencies that he was doing business as an individual and operating the Acme Meat Company as an individual proprietor; he said in fact that he and Mr. Himmelfarb had an arrangement which began on May 1, 1944, whereby they would share equally from the profits, that is

(Testimony of Donald Bircher.)

the legitimate profits he specified, of the Acme Meat Company, which were wholesalers and packers of meat.

He said they would share equally in such legitimate profits as to the first \$24,000 and that any legitimate profits above that sum belonged to him.

He said he had other profits resulting from over-charges to customers. He said he preferred to call such over-charges bonuses or gifts because of the fact that he might get into difficulty with other governmental agencies.

He said these bonuses or gifts totaled a little in excess of \$70,000 for the period from May 1, 1944, to April 30, 1945.

He said that he kept no books or records regarding such side profits that they had made from the customers of the Acme Meat Company.

He said that the side charges or collections from the customers of the Acme Meat Company had not been uniform, had not been determined on the basis of so much per pound, that the over-charges or excess charges which had not been recorded in their books or records fluctuated and determined upon the market, how much the customers were willing to pay on the side.

He said he didn't want it known that they had gotten those over-charges for fear of cancellation of the license of the Acme Meat Company to do business as a packing house or as a wholesaler. That he said was his principal concern. He wanted to pay whatever taxes he owed, which he and Mr.

(Testimony of Donald Bircher.)

Himmelfarb, his associate, had not reported in their 1944 individual returns which had been made on the calendar year basis. [1045]

He said that he and Mr. Himmelfarb were that day filing or had filed a fiscal year return reporting the total of these unrecorded profits.

I asked him if he had a record of such unrecorded profits and he produced a small memorandum book, rather gold fabric or gold colored paper cover back, about an inch and a half by $2\frac{1}{2}$ inches, and I asked him if he would give me the page out of that book upon which he had a few figures recorded showing, which he said showed the profit, the net profits, from these unrecorded over-charges for the period April 30, 1944, or May 1, 1944—I am not sure—to January 5, 1945, and for the period from January 5, 1945, to May 1, 1945, or April 30, the day before, 1945.

These figures totaled about a little in excess of \$35,000, and something in excess of \$11,000 was recorded as having been earned from the secret charges or unrecorded charges during the first portion of the period, which was from May 1, 1944, to January 5, 1945, and the balance of the sum in excess of \$35,000, or some \$23,000, was recorded as shown as having been earned from excess charges and unrecorded charges from customers during the period January 5, 1945, to April 30, 1945.

I asked him if he would let me have that record, and he said he would not.

(Testimony of Donald Bircher.)

I asked him to give me that page out of the book so I [1046] could copy them and he did that and I copied the figures while he sat there with me, and I still have them.

He said that he had talked with Mr. Himmelfarb regarding their dilemma and worry about having gotten these secret charges on the side, and he said that he wanted to do whatever he could to straighten the matter out, to pay up quickly, that he wanted to be able to walk around and look people in the face again, that he had worried a lot about the matter.

Q. Was anything said as to how the money which you testified to was divided?

A. He said that he and Mr. Himmelfarb——

The Court: He just answered that a few moments ago. The witness related that a moment or so ago.

The Witness: I would like to answer it completely. I did not finish my answer.

The Court: All right.

The Witness: He said that he and Mr. Himmelfarb usually collected these excess or unrecorded charges in cash daily from their customers.

He said Mr. Himmelfarb made most of the collections from the meat customers at the same time they paid their regular bills; that in addition to these invoice bills he would collect so much on the side and the amount would depend upon the fluctuating market, whatever the supply of meat would indicate. [1047]

(Testimony of Donald Bircher.)

He said that they divided their profits every day, sometimes every three days, sometimes maybe three times a week; that they each kept a memorandum of the amount that they divided and that each time they made a division of these cash profits, unrecorded cash profits, that they added to that amount that they divided that day the amounts previously divided and that they kept only that running balance. They kept no books and records regarding the extra charges they collected.

He said that he had talked the matter over with Mr. Himmelfarb regarding the fact that neither one of them had reported these extra charges, the extra income, in their 1944 returns, and that he felt that Mr. Himmelfarb would cooperate with us.

I told him that we planned to go immediately and interview Mr. Himmelfarb.

At that time I asked him if he wanted to make a statement before a stenographer, so that we would have a record of it so that no one would forget what was said on that occasion. He said that he did not care to do that, and at this conference or on my table, Deputy Collector Schlick made notes during the interview in plain sight of everyone, kept current notes. Deputy Collector Phoebus also made certain notes.

After this preliminary interview I asked Mr. Ormont if it was agreeable if I would prepare an affidavit with him and [1048] for him to review and sign at that time. I thereupon prepared in long-hand just one affidavit, no copy of it, there at my

(Testimony of Donald Bircher.)

desk. We went over each sentence, Mr. Ormont and I, with the others present. [1049]

At the conclusion of that I asked him to be sworn, and to sign the statement, and he was sworn and signed the statement, and left the statement with me.

Q. Is that all that happened at that interview?

A. At the conclusion of the interview Mr. Ormont left. He said that he would give us free access to anything we wanted. I asked him if he had any record that we could refer to to verify this extra or side extra collection—this money he had gotten from extra collections. He said that he had no record, and that they had kept no record, except the daily running total.

I asked him if he would give me the names of a few of his retail meat customers, so I might contact them, and try to verify those payments, and try to verify his total, as he had reported to us, and he said no, he did not think that it was necessary. And thereupon he left the office, and agreed that we could have free access to the books and records, and go ahead and make our own determination as best we could.

And he left our office at that time, and we thereupon promptly drove to his office at the Acme Meat Company in South Gate, and as we entered the yard he also drove in; and Mr. Himmelfarb was in the yard and Mr. Ormont brought Mr. Himmelfarb over and introduced him to us, and told him who we were. And thereupon I asked Mr. Himmelfarb if he would——

(Testimony of Donald Bircher.)

Mr. Katz: I object to this, if the Court please, as not [1050] responsive to the question. This is relating a conversation up at the office.

The Court: I think he has answered your question.

Q. (By Mr. Strong): Subsequent to that interview that day, at the office, did you have any other interview with Mr. Ormont, on that same day, or any other day?

A. Yes, later that day. That was about 2:30 that they left.

Q. Where was it held?

A. In the office of the Acme Meat Company, South Gate.

Q. Who was present?

A. Mr. Himmelfarb, Mr. Ormont, Deputy Collectors Phoebus and Slick, and myself.

Q. Will you testify what occurred, and what was said upon that occasion?

Mr. Katz: That is objected to, if the Court please, as to the defendant Himmelfarb, upon the ground that no foundation has been laid; it is irrelevant and immaterial; and that no corpus delicti has been established.

Mr. Strong: At this time, I would like to state, your Honor, that the corpus delicti has been established, and I am offering this testimony as to Mr. Himmelfarb as well as Ormont. If your Honor desires me to state what I consider to be the corpus delicti, I can do so. [1051]

(Testimony of Donald Bircher.)

The Court: Where is there sufficient foundation laid to permit this conversation against the defendant Himmelfarb.

Q. (By Mr. Strong): Would you state the conversation? And this is being offered as to the defendant Ormont—the conversation and what transpired.

A. There were two portions of the conversation. The first portion was when we first arrived in the yard of the Acme Meat Company, and Mr. Ormont introduced us to Mr. Himmelfarb. We told him who we were, and that we wanted to talk to him regarding his income tax matters, and at that time I asked Mr. Himmelfarb if he was agreeable to discussing matters with us; and we got into the back seat of Mr. Slick's automobile. Mr. Himmelfarb and I sat in the back seat, and Deputy Collectors in the front seat. Mr. Ormont went into the office of the Acme Meat Company, and left us sitting in the yard.

Q. Mr. Ormont left you at that point?

A. Yes.

Q. Did you again, during the same day, and during this same interview, see Mr. Ormont?

A. Yes.

Q. And where was that?

A. In the office of the Acme Meat Company.

Q. Who was present? [1052]

A. Mr. Ormont, Mr. Himmelfarb, the two Deputy Collectors, and myself.

Q. Will you state what was said, and what transpired at that point?

(Testimony of Donald Bircher.)

The Court: This is as to Sam Ormont only?

Mr. Strong: Yes.

A. Mr. Ormont asked us if we would step into his small office, out of the regular large business office, and we did. That was a small office, I guess not over 6 feet square, and five or six of us were standing around in that office. There was hardly standing room. There wasn't room for anyone to sit down.

Q. Whatever position you were in, will you tell us what happened?

A. It was cramped quarters. Mr. Ormont stated that he would like to see the affidavit he had signed at our office, since he then held in his hand the affidavit I had prepared for Mr. Himmelfarb to sign. He said, "I would like to compare them." He did not think they were the same, and consistent with one another. So I let him see the same affidavit he signed, and which was on Government letter-head paper, at our office.

Mr. Ormont then took his two hands and started folding these two affidavits together. I stepped in quickly, and put my hand between his two, and grabbed the affidavits. I [1053] said, "Don't do that." I said, "You are trying to destroy Government property. Apparently that is what you have in mind. You had better be careful." I said, "That is very serious. Give it a lot of thought before you do it." Mr. Ormont held on firmly, and I held on firmly; and I reminded him of that many times.

(Testimony of Donald Bircher.)

He began to twist and crush the paper, and twist my hand. I still held on vigorously. Finally he gnashed his teeth, and started jumping like a wrestler, and finally something happened, and he went out the door and went down the bloody spillway, I chasing after him.

The Court: What did you do when he gnashed his teeth?

A. I gnashed mine.

Q. (By Mr. Strong): Who had the affidavit?

A. Mr. Ormont took with him the affidavit as he broke away from me, and ran through the door, and down the bloody spillway, where they were slaughtering cattle. I ran after him. By the time I got to him he was standing alongside a large can of debris, from the bloody animals. I asked him to give me the affidavit. He said he couldn't. I told him he had better. And thereupon we walked back into the office, and had some further discussion.

Then we told him we would go into the matter further at a later date. [1054]

Mr. Himmelfarb and the two Deputy Collectors and I were present during all this that I have related. Do you want me to go on to any subsequent conversations with the defendant Ormont?

The Court: Was that the end of that conversation?

The Witness: Yes, that is the end of that. The following day, yes.

Q. (By Mr. Strong): Where?

A. At Mr. Ormont's bank.

(Testimony of Donald Bircher.)

Q. Who was present?

Mr. Robnett: Before going into this, I move to strike that other answer, as not a statement of the conversation, which pertains to the issues in this case. He is talking about acts more than anything else.

Mr. Strong: It goes to wilfulness? It is part of the whole transaction.

The Court: It is only admissible on the basis that the original document is not available, and as a foundation to admit the testimony concerning the contents of the document.

Q. (By Mr. Stone): Will you state the contents of the document which was given by Mr. Ormont, which you have just testified to, as an affidavit?

Mr. Robnett: I ask that the jury be instructed that they [1055] are only to consider it for the limited purpose your Honor has said.

The Court: That is correct. That is merely foundation testimony to permit this witness to testify to what was in the document, because the Government either has to produce the original, because the defendant cannot be compelled to produce the document, if they depend on it, or they have to show a reason why the original can't be produced.

The Witness: The affidavit that I prepared on May 24th, at our office in this building——

The Court: That is the one you were just talking about, the gnash episode?

The Witness: That's correct. The affidavit stated that Mr. Ormont had received approximately

(Testimony of Donald Bircher.)

\$35,000 extra income, not reported on his books and records, and the portion which he had received in 1944 he had not reported on his 1944 income tax return. That is about all.

The Court: It was a short affidavit then, wasn't it?

The Witness: Yes, only about ten lines.

Q. (By Mr. Strong): Is that the substance of it? A. Yes. [1056]

Q. Now on May 24th, on that occasion that you just testified to, was there any discussion with reference to bonds?

The Court: May 24th? Where is this?

Mr. Strong: At the plant.

The Court: With Mr. Ormont?

Mr. Strong: Yes.

The Witness: I can't be definite that we discussed it on that date. The following day we did.

The Court: How did you happen to get over to the bank there the next day? Did you and Ormont just happen to be in there coincidentally at the same time?

The Witness: No, your Honor. Mr. Malin called me the next day, said he had been retained as a certified public accountant to represent Mr. Ormont in his tax difficulties; said he wanted to apologize on behalf of Mr. Ormont for what had happened and that he wanted to know what he could do to help straighten it out.

He said we were——

Mr. Robnett: I move to strike out this as a vol-

(Testimony of Donald Bircher.)

untary statement and not responsive to the question your Honor asked. You asked him how he got over to the bank.

The Court: Yes. It is responsive.

Mr. Robnett: It contains hearsay also.

The Court: Yes, it does. It is good on that ground. [1057]

Mr. Strong: It is the confidential agent of the defendant, your Honor.

The Court: The answer is stricken.

The Witness: Shall I answer it?

The Court: You can answer it summarily without stating the conversation.

The Witness: Yes. I met Mr. Ormont at his bank on May 25, 1945. On that occasion Mr. Ormont said that we could examine——

The Court: How did you happen to get there?

The Witness: By prearrangement with his accountant. We all met together. At that time Mr. Malin was present, Mr. Ormont, the deputy collectors and myself.

We thereupon went to the safe deposit box section and Mr. Ormont obtained his key and we were taken to a small room where he opened the safe deposit box.

Q. (By Mr. Strong): Who is "he?"

A. Mr. Ormont opened the safe deposit box, and I asked Mr. Malin to take out his work papers and copy in our presence so that we could watch him, each document as it was taken out of the safe deposit box by Mr. Ormont or by himself.

(Testimony of Donald Bircher.)

Mr. Ormont stood alongside of me and the deputy collectors, Mr. Malin sat down at the table in front of us and made the list, as the bonds were taken out one at a time. [1058]

Q. Before you go further into the events of that day, I will show you Government's Exhibit 42 and ask you if this is the list that was made as you have just testified.

A. Yes, that is the list; Exhibit 42.

Q. Now will you continue with the conversations and occurrences?

The Court: This is still at the safe deposit box?

The Witness: In the little booth where we were inventorying the safe deposit box.

The Court: About as big as his office?

The Witness: About the same size, just room for the four of us to stand up and one to sit down at a little short table. And it was hot and stuffy. We all complained about it.

Mr. Ormont stated that he had purchased most of the bonds that were in his box, even though a portion of them were recorded in the name jointly with the name of his mother, Mrs. Dora Goldberg; he had purchased them with his funds mainly from the extra charges that he had collected on the side which are not recorded in his books. Some of them he had purchased in earlier years with some of his savings.

He stated that he noticed that one of the bonds we came to was recorded in his name alone and not in the name of his mother and he jointly, and

(Testimony of Donald Bircher.)

he asked us whether we thought it was possible for him to get it corrected so that it could be in their names jointly. He said that although it was his [1059] funds, yet he wanted to have it in the name of himself and his mother.

We just completed our examination, Mr. Malin took his original sheet that he had compiled in our presence and we all watched him mark down the numbers and the dates, the payees of the bonds, and thereupon Mr. Ormont closed his safe deposit box and we started to the front sidewalk in front of the bank.

At that time Mr. Ormont came over to me on the side and apologized repeatedly for what he said he had done the day before.

Mr. Robnett: What did he say, if you remember?

Mr. Strong: I am asking the questions at this point, your Honor.

Mr. Robnett: Then I move to strike out his conclusion on the ground that it is a conclusion of the witness. He said he apologized repeatedly.

The Court: It will be stricken.

Q. (By Mr. Strong): Don't go into the apology at all. A. All right.

Mr. Ormont said that he wished to apologize for his actions the day before in having taken the affidavit from me forcefully and doing away with it, and he asked me what could be done to straighten out the situation. I told him the thing [1060] for him to do was to produce the affidavit.

(Testimony of Donald Bircher.)

He said he couldn't do that.

Then there was some other conversation. He said that he always attempted to keep in good physical condition, and we made certain remarks about what had happened the day before——

Q. Did it have anything to do with the income tax or his income?

A. No, but one remark did.

Q. Let's have it.

A. He said, "Mr. Bircher, as proof of my patriotism, I want you to know that all this extra money I got on the side I put in war bonds."

That is about all.

Q. Did that end the conversation at that time?

A. He said he would be glad to give us whatever he could and he was very sorry for what happened and that he would instruct his accountant to cooperate with us, give us what assistance he could in arriving at his tax liability.

Q. Was that all that was said on that occasion?

A. Yes, that is all.

Q. Now I show you Government's Exhibit 50-A, B, C, D, and I show you also Government's Exhibits 51-A, B, C and D and ask you if you ever saw those before, and also Government's Exhibit 52 for identification.

A. Yes, I have seen each of these papers. [1061]

Q. And where did you get Government's Exhibits 50-A, B, C, D and 51-A, B, C and D?

A. I received them all through the mail at my office upstairs from Mr. Malin.

(Testimony of Donald Bircher.)

Q. Did you receive them in that envelope?

A. Yes.

Q. That is Government's Exhibit 52 for identification?

A. Yes. At the time I received them I opened the letter and stapled the envelope to them and they have been intact ever since.

Q. Until I unstapled them?

A. That is correct.

Q. Here? A. That is correct.

Mr. Strong: I offer in evidence Government's Exhibits 50-C, 51-D and 52.

The Court: Admitted.

(The documents referred to were received in evidence and marked Government's Exhibits 50-C, 51-D and 52.)

Q. (By Mr. Strong): Now in connection with Government Exhibits 50-A, B, C, D and 51-A, B, C and D, did you at any time have any discussion with the defendant Ormont as to the documents themselves? A. No. [1062]

Q. Did you have any discussions with the defendant Himmelfarb as to those documents?

A. No.

Mr. Strong: I would like to have this piece of paper, which is stapled to a bigger sheet, marked for identification, your Honor.

The Court: No. 53.

(The document referred to was marked Government's exhibit No. 53 for identification.)

(Testimony of Donald Bircher.)

Q. (By Mr. Strong): I show you Government's Exhibit No. 53 for identification.

Q. (By Mr. Strong): I show you Government's Exhibit 53 for identification and ask you if you ever saw this slip of paper which is stapled to the bigger sheet prior to this occasion? A. Yes.

Q. Will you state what that slip of paper represents, physically?

A. That is a sheet or paper Mr. Ormont gave me from his small notebook in which he had these same figures recorded.

Q. Is that what you testified to before, the slip of paper? A. Yes.

Q. And the figures on there, what figures are those?

A. Those are the figures that Mr. Ormont had recorded in his book which he gave me to copy.

Q. Whose handwriting are those figures in?

A. Those are in my handwriting, made in his presence on this slip of paper.

Mr. Strong: I offer in evidence Government's Exhibit 53 for identification.

The Court: Admitted.

(The document referred to was received in evidence and marked Government's Exhibit No. 53.)

Mr. Strong: Shall I stop now? You said we would run until 4:00 o'clock.

The Court: Very well. This case is continued until 10:00 o'clock Tuesday morning; the court is

recessed until 10:00 o'clock Monday. Remember the admonition.

(Whereupon, at 4:00 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Tuesday, June 10, 1947.)

Los Angeles, California, Tuesday, June 10, 1947

10:00 A.M.

(The following proceedings were had outside of the presence of the jury:)

The Court: United States vs. Ormont and Himelfarb.

Mr. Strong: Ready.

Mr. Robnett: Ready. If your Honor please, at this time there is a matter I wish to call to the Court's attention——

The Court: The record will show the defendants are present.

Mr. Robnett: I want to present it without the jury being present. I call your attention to the transcript, on pages 1053 and 1054; that, as you will recall, was the testimony of the witness who is now on the stand, Mr. Bircher, with respect to what transpired down at the plant on the 24th day of May, 1945.

The Court: This is Mr. Phoebus' testimony?

Mr. Robnett: No, this is Mr. Bircher's testimony, and as to certain documents called affidavits, and what the defendant did in regard to taking those affidavits to them. If you will note, com-

mening at the foot of page 1053, to the top of page 1054, the witness says:

“I said, ‘Don’t do that.’ He said, ‘You are trying to destroy Government property. Apparently that is what you have in mind. You had better be careful.’ [1068] I said, ‘That is very serious.’ Give it a lot of thought before you do it.’ Mr. Ormont held on firmly, and I held on firmly; and I reminded him of that many times.” Then he goes on and states: “Finally he gnashed his teeth, and started jumping like a wrestler, and finally something happened, and he went out the door and went down the bloody spillway, I chasing after him.” Further, on that same page, lines 22 and 22:

“I asked him to give me the affidavit. He said he couldn’t. I told him he had better. And thereupon we walked back into the office, and had some further discussion.

“Then we told him we would go into the matter further at a later date.”

If the Court please, upon that evidence, I wish to say this to your Honor—I could hardly hear the witness the other day. I asked him to speak up. I did not get all the significance of this at the time in order to effect an objection? It is only since I have gotten the transcript.

I now, at this time, move to strike all of the testimony of the witness Bircher, as to conversations and transactions that happened after that incident he just testified to, on the ground that thereafter anything that the defendant said or did was,

of necessity, said and done under threat, and not voluntary, because here he was under a threat, that he had better [1069] not do this; he was destroying Government property; it was very serious, and that they would go into that matter further at a later date. And I think it is a sufficient showing to show that the defendant thereafter would be under fear as to anything he might say or do. The only other testimony given by the defendant——

The Court: By the defendant?

Mr. Robnett: I should not say the defendant. I mean by the witness, that this motion would not apply to, was his statement, of course, of the contents of the affidavit. This was only a groundwork for the admission of parole testimony.

I am not moving to strike that, your Honor. I am moving to strike all the other testimony. You will reserve that the other testimony goes into conversations down at the bank vault, with regard to bonds and bond lists, and the making of it, and all things that the defendant was supposed to have said at that time, and at that place, namely, at the bank—I think that all of that should go out upon the ground that anything that was said or done after by the defendant was done under these threats.

That would be borne out by the evidence of this same witness to the effect that thereafter Mr. Ormont many times, he says, told him he was sorry, and apologized, and such as that, showing that the defendant had some fear in his mind at the time, and wanted to correct anything that was done.

That is my motion, to strike all of that evidence that follows that, the conversation, and all things that happened with regard to his showing them the bonds, letting them take a list of the bonds, and also as to any furnishing of books or records thereafter, on the ground that that was and still is a threat.

The Court: I don't think I can reach that conclusion.

Mr. Strong: At this time, outside of the hearing of the jury, may I present a matter too?

The Court: Is this in relation to this matter?

Mr. Strong: No.

The Court: I don't think I can reach that conclusion, Mr. Robnett, from the testimony that has gone in to date. I will have to deny the motion.

Mr. Robnett: May it be considered, without my having to repeat it before the jury, that I have made this same motion before the jury, and the same ruling?

Mr. Strong: That is perfectly agreeable.

The Court: Very well.

Mr. Strong: At this time, your Honor, I would like to represent, and this is the last time, I promise, the question of how much warning, and what warning is necessary to be given by the agents before the testimony which they offer will be received in evidence, as to conversations by the defendants with them; and I would like to have these documents marked for [1071] identification, if your Honor please. I have a copy of them, and also have the originals for examination.

These are documents which relate to the authority of the agents, the first of which I would like to have marked being a copy of the credentials which the witness testified were shown to the defendants. That is, the witness Bircher, and the witness Phoebe testified, as to these credentials. I think on their face they indicate just exactly what the agent was doing, what was the scope of his authority. I submit they constitute a complete warning to any person who is being questioned or investigated, of what is going on; a sufficient warning to admit the admission of all conversations taking place subsequently between them.

The Court: I have admitted all of the conversations as to the defendant Ormont.

Mr. Strong: This is just as to Himmelfarb.

The Court: And I have admitted conversations of the defendant Himmelfarb with the witness Bircher, after this incident. You heard them read and described this morning, did you not?

Mr. Strong: I don't think I understand that your Honor did.

The Court: I did not admit conversations either; I admitted letters authorizing the agents.

Mr. Strong: The second point is that I want to again [1072] bring before your Honor's attention the scope of authority and function of these agents. I would like these documents marked for identification.

The Court: Let me see the cards.

The Clerk: Do you want to mark this card 54? This is a copy of the credentials.

Mr. Strong: 55 is a copy of a letter from the Treasury Department. I have here the original letter with the original signature of the Commissioner of the Bureau of Internal Revenue.

The Court: That will be 55.

(The documents referred to were marked Government's Exhibits 54 and 55 for identification.)

Mr. Strong: I want to submit to your Honor's consideration again, the fact, of course that from our position, no warning as to criminality had to be given the defendant Himmelfarb under the circumstances shown to exist in this case. Secondly, even if any warning had to be given the defendant Himmelfarb, he was fully on notice of precisely what was transpiring, on the basis of Government's Exhibit 54, which were the credentials which were shown to the defendant himself. On that basis, your Honor, I would like to ask your Honor to reconsider the ruling which does not permit me to go into conversations with the defendant Himmelfarb.

The Court: Will you refresh my memory? There was one [1073] occasion when the witness talked to the defendant Himmelfarb, which I excluded, is that correct?

Mr. Strong: Just one occasion.

The Court: And on one occasion when the witness Eustice talked to the defendant Himmelfarb?

Mr. Strong: And Bircher.

The Court: The testimony shows that Eustice's

conversation with the defendant Himmelfarb was prior to the advent upon the scene of Mr. Bircher; prior to Mr. Bircher's conversation with Mr. Himmelfarb.

Mr. Strong: It also shows that Mr. Eustice's position was that of Special Agent, and not connected with that branch.

The Court: Only upon one occasion was the witness Phoebus present with the witness Bircher. That was the bloody runway occasion; the affidavit occasion, isn't that correct?

Mr. Strong: Yes, they were present at the plant on that occasion.

The Court: The witness Phoebus was there?

Mr. Strong: The witness Phoebus was there with the witness Bircher.

The Court: Where in the record is that incident brought up, Mr. Katz, upon which I based my ruling. I am satisfied I am correct about the witness Eustice. I am satisfied I am correct about the witness Phoebus as to his first conversation, on the 23rd of May. I will give consideration to the matter of [1074] reopening the testimony concerning the witness Bircher's conversation.

Mr. Strong: May 23rd is the one on which your Honor did not permit me to give at all. I want also to offer the testimony as to the 23rd, when Phoebus and Bircher were speaking to Mr. Himmelfarb.

The Court: That is the conversation I am now thinking of.

Mr. Strong: Then there was one on the 24th, at the bloody runway. At any rate, I would like to go into all the conversations between the witness Bircher and Mr. Himmelfarb.

The Court: Let me find the transcript. Do you wish to be heard, Mr. Katz?

Mr. Katz: If the Court please, I have been trying to locate that in the transcript.

The Court: On page 1052 the witness Bircher testified—he begins on page 1040. He speaks first of having been assigned to conduct investigations of the income tax of Sam Ormont and Phillip Himmelfarb. On page 1040, on May 23rd, he says he did not warn the defendant Himmelfarb as to his rights. Is that correct?

Mr. Katz: That is correct.

The Court: There is nothing in the record to show that they advised Himmelfarb that they were investigating his income tax.

Mr. Strong: Page 1040. [1075]

The Court: That is what Mr. Bircher was told; not what Mr. Himmelfarb was told. Then, the conversation in the office, at which Himmelfarb was not present, and then, on page 1052:

“There were two portions of the conversation. The first portion was when we first arrived in the yard of the Acme Meat Company, and Mr. Ormont introduced us to Mr. Himmelfarb. We told him who we were, and that we wanted to talk to him regarding his income tax matters, and at that time I asked Mr. Himmelfarb if he was agreeable to discussing mat-

ters with us; and we got into the back seat of Mr. Slick's automobile."

There is nothing more about the conversation with Himmelfarb at that time. Himmelfarb was present when the incident occurred of the affidavit, and there isn't anything more. I don't think that is sufficient, Mr. Strong. I think when Internal Revenue agents go out, it isn't sufficient to just show them their card, and say they are investigating their income tax matters. They have got to warn them. And their testimony is not any evidence at all. Mr. Himmelfarb was never told of the right not to give information, and if he did, it would be used against him. I think that right has got to be preserved.

Mr. Strong: Your Honor does not feel that showing his card is sufficient?

The Court: I don't think it is. Experience teaches us that there are thousands and thousands of investigations, that [1076] are made, that never eventuate in a criminal prosecution, and a man should not presume, just because an Internal Revenue Agent comes to him to seek information that he is going to be prosecuted.

Mr. Strong: The Internal Revenue Agent doesn't know who is going to be prosecuted.

The Court: I know he doesn't. I think he owes a duty, when he is investigating a man's income tax, to warn him; and they talk just as freely if he does.

Mr. Strong: I understand Mr. Himmelfarb was not warned of his rights.

The Court: That is right.

Mr. Strong: Then there is no use to make an offer to introduce the testimony.

The Court: If you wish to make an offer of proof for the record, you may do so.

Mr. Strong: I would like to, if I may.

The Court: Surely.

Mr. Strong: May we have Mr. Bircher state the offer of proof, since he is more familiar with the facts than I am?

The Court: I don't think so. I think we had better keep the United States Attorney, the representative of the Government, who speaks rather than from the witness stand in the court room.

Mr. Strong: I would like to make an offer of proof that if [1077] Mr. Bircher were permitted to testify, and Mr. Phoebus were permitted to testify, as to the conversations between themselves and the defendant Himmelfarb, on May 24, 1945, in the automobile, as was shown before, concerning the income, and income tax return of Mr. Himmelfarb for the year 1944, that they would testify to the effect that Mr. Bircher showed his credentials to Mr. Himmelfarb, and explained to him what his position was, in the discussion with Mr. Himmelfarb; that they then proceeded to ask Mr. Himmelfarb questions, and to receive answers from him, without going into detail as to what was said—

The Court: In substance Himmelfarb said—

Mr. Strong: In substance, Himmelfarb replied, and said the same things, which Mr. Ormont had said, and which was heretofore testified to by Mr. Bircher.

The Court: On the same day, at the agents' office?

Mr. Strong: Yes, your Honor. In fact, what he admitted was that he received this additional money, as he testified with reference to Mr. Ormont, and indicated at that time that this was a practice of collecting extra charges, in addition to the selling price, which was recorded on the invoices, for meat sold by the Acme Meat Company, and that these extra charges were not recorded by either of the defendants——

The Court: Except——

Mr. Strong: Except on this little daily cumulative paper, [1078] showing cumulative amount from day to day, without showing who it was received from, and how much.

Mr. Himmelfarb also was asked whether he had a similar piece of paper to that which Mr. Ormont produced, and Mr. Himmelfarb also produced a piece of paper, which also had cumulative amounts which he admitted were received by him as a part of the extra charges which he shared with Mr. Ormont, and those were received by extra sales of meat the Acme Meat Company made to customers. That this collection was begun some time in May, 1944, and discontinued some time in the latter part of April, 1945. That they regularly divided the receipt of this money, that is, Mr. Ormont and Mr. Himmelfarb regularly divided these extra charges, on a fifty-fifty basis, and they settled together at different intervals of time; sometimes every day, and sometimes possibly at week intervals.

I haven't gone into all the details.

The Court: In substance, that is your offer?

Mr. Strong: And in addition to that an affidavit was prepared for Mr. Himmelfarb's signature, which was worded the same, or almost the same, as that which had been prepared for Mr. Ormont, and as to which there was testimony Mr. Ormont signed; and those disappeared down the bloody spillway. And we have a carbon copy of the affidavit which was prepared for Mr. Himmelfarb's signature. I have it here. I would like to incorporate it as part of the offer of proof. I suppose it will [1079] be rejected as an exhibit.

The Court: If you wish to offer it and have it marked for identification, you may.

Mr. Strong: Yes, your Honor, may I have it marked for identification?

The Clerk: 56.

Mr. Strong: This affidavit was shown to Mr. Himmelfarb, the contents discussed with him, and the facts contained in that affidavit are facts which were relied on——

The Court: The affidavit was not signed?

Mr. Strong: The affidavit was not signed.

The Court: Do you wish to state your objection?

Mr. Katz: At this time the defendant Himmelfarb objects to the offer of proof upon the ground that there has been no foundation laid; that there was not, and has been no testimony by Bircher, or anyone else, that there was any disclosure or statement to the defendant of his constitutional rights, or that he was ever informed that he had a right

to have counsel, or anything else, in connection with it, or whether the statement could or might or could be used against him.

Also, your Honor, in addition to the grounds stated, that there has been no foundation laid for such testimony, I make the objection upon the ground that there is no corpus delicti established. The corpus delicti may not be established by proof of conversations, on the basis of admissions or confessions, and that, in effect, is what is sought to be done here. Also upon the ground that it is incompetent, irrelevant and immaterial; has no bearing upon any of the issues in this case, and further upon the ground that no corpus delicti has been established.

The Court: The objection will be sustained upon the ground that no foundation has been laid. I will not sustain it upon the ground that no corpus delicti has been established. At this time I do not wish to be understood that I am ruling that the corpus delicti has been established. The objection upon the ground that no foundation has been laid is sufficient. Upon that basis it is sustained.

Mr. Strong: I also want, in connection with that offer of proof, to offer two other documents. 54 and 55 for identification I would like to offer in evidence, and I offer 56 in evidence. Those are the two copies of the authoriation and authority.

The Court: 54 is a copy——

Mr. Strong: Of the credentials.

The Court: Of the credentials shown.

Mr. Strong: Yes.

The Court: 55 is not?

Mr. Strong: No.

The Court: 54 is admissible. 55 is not. It is hearsay.

Mr. Katz: As to 54 may I interpose the objection that the [1081] exhibit, as to the defendant Himmelfarb, is hearsay; that there has been no foundation laid. Further, there is no indication here that it was laid.

The Court: I don't know that there was any testimony here that he showed it to Himmelfarb.

Mr. Strong: I will save time by asking questions, if I may.

The Court: I will withhold rulings on the objections then.

Are the preliminary matters over and are we ready to call down the jury?

(Assent.)

Call the jury down. [1082]

(The jury returned to the courtroom at 10:40 o'clock a.m.)

The Court: Usual stipulation?

Mr. Strong: So stipulated.

Mr. Katz: So stipulated.

Mr. Robnett: So stipulated.

The Court: Mr. Bircher.

DONALD BIRCHER

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Strong:

Q. Mr. Bircher, on May 24, 1945, as you testified when you were in a car at the Acme Meat Company plant and you spoke to the defendant Himelfarb, did you make any statement to him at that time as to what you were doing? A. Yes.

Q. Will you state what you said?

Mr. Katz: Objected to, if the Court please, no proper foundation laid.

Mr. Strong: The foundation was laid as to who was present the other day, your Honor.

The Court: That foundation is present. I think the question is a little broad. It would permit the witness to make a statement as to what was said, but what you are now [1083] endeavoring to do is establish a foundation?

Mr. Strong: That is all. I don't want the conversation between them, as to the substance.

The Court: Did you ever show him your credentials?

The Witness: Yes, I did.

The Court: You did?

The Witness: Yes.

Q. (By Mr. Strong): I show you Government's Exhibit No. 54 for identification and ask

(Testimony of Donald Bircher.)

you whether that is a copy of the credentials. Do you have the original with you?

A. Yes. (Producing credentials.)

Mr. Katz: Objected to as calling for a conclusion of the witness, if the Court please.

The Court: Overruled.

The Witness: Yes, that is a copy.

Q. (By Mr. Strong): And Government's Exhibit 54, the original of that, was that the document that was shown by you to the defendant Himmelfarb?

A. Yes, that is the one I have in my hand.

Q. Did you read to him the contents of that document? A. No.

Mr. Robnett: I assume this is only being offered as to Mr. Himmelfarb? [1084]

Mr. Strong: At this time.

The Court: Yes.

Q. (By Mr. Strong): Did he take the document from your hands? A. Yes, he took it.

Q. What did he do with it?

A. Read it and looked at it and held it in his hand.

Mr. Katz: I move to strike "he read it" as calling for a conclusion of the witness.

The Court: It may be stricken, that he read it.

Mr. Strong: It is a physical fact.

The Court: How can you tell if anybody is reading it?

Mr. Strong: When somebody stands and looks at a document, he is reading it.

(Testimony of Donald Bircher.)

Mr. Katz: He may be intrigued by the picture on it.

The Court: I took a lot of Japanese documents and looked at them a long time but I wasn't reading them.

Mr. Strong: That is all. I offer in evidence Government's Exhibit 54 for identification.

Mr. Katz: Objected to as immaterial, if the Court please, no foundation laid, incompetent, irrelevant and immaterial, no bearing upon any issue in this case.

The Court: Overruled. Exhibit 54 is admitted in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 54.) [1085]

Mr. Strong: No further questions.

The Court: Cross-examine. Had you cross-examined Mr. Bircher, anybody yet?

Mr. Strong: Nobody has yet, your Honor. I just stopped.

Cross-Examination

By Mr. Robnett:

Q. Mr. Bircher, I understand from you that you had a conversation with the defendant Sam Ormont in this building on May 24, 1945.

A. Yes, sir.

Mr. Katz: If the Court please, I am going to object to this questioning, or further testimony along this line, and ask to have the same under-

(Testimony of Donald Bircher.)

standing with respect to each objection made and the same ruling, if that is agreeable with your Honor.

The Court: The objection to that question is sustained as to the defendant Himmelfarb. It will be deemed that that objection will have been made and the same ruling to each of this line of questioning unless it is otherwise noted or unless counsel calls the matter to my attention so that I may advise the jury with relation to it.

Q. (By Mr. Robnett): And at that conversation there was present Mr. Phoebus, who has already testified here, and a Mr. Schlick, did you say? [1086]

A. Yes, Deputy Collector Walter Schlick.

Q. Mr. Ormont and yourself, constituted all that were present? A. That is correct.

Q. Now at the time the conversation opened you made some statement to Mr. Ormont, you said?

A. Yes.

Q. And at that time Mr. Ormont, before making any statement of anything else asked you, did he not, whether or not anything he might say there would be kept in confidence by you and those present, or words to that effect?

A. Yes, he asked something of that kind.

Q. And didn't he at that time tell you and those present that so far as any income tax was concerned, that he intended to pay whatever he owed or whatever might be bound to be owing?

A. Yes, he said he wanted to straighten it out.

(Testimony of Donald Bircher.)

The Court: Did he say he wanted to straighten it out or did he say he wanted to pay it?

The Witness: He said he wanted to pay, do anything he could to straighten out the matter.

Q. (By Mr. Robnett): He told you, did he not, that the only concern he had, or had ever had with regard to the matters you were about to discuss, were matters in his mind with regard to the [1087] other departments of the Government?

A. No, he did not say that.

Q. But he did tell you, did he not, that that was his chief concern?

A. He said his chief concern was——

Q. Just answer this yes or no, please, and we will get along faster.

Mr. Strong: I submit if he can't answer the question he can explain it.

The Court: He can answer it yes or no and then we can see if he has an explanation.

The Witness: Yes. May I explain it?

Mr. Robnett: No.

The Court: Counsel can pick it up on redirect.

Mr. Strong: May I have the question read, your Honor, so that I will know what to ask?

(The question referred to was read by the reporter as set forth above.)

The Court: That is, other departments of the Government?

Mr. Robnett: Yes.

Q. And he told you at that conference, did he not,

(Testimony of Donald Bircher.)

that the matter he was about to discuss with you all transpired after or commencing with the 1st day of May 1944? A. No.

Q. He did not? [1088] A. No.

Q. Didn't he tell you that was the date when he and Mr. Himmelfarb made their arrangements between themselves as to the so-called extra charges?

A. That is correct.

Q. And he told you, did he not, that that continued from that date until the last of April 1945?

A. He said it continued after that even.

Q. After that? A. That is correct.

Q. And he told you, did he not, that that particular transaction between you and Mr. Himmelfarb was reported by him or being reported that day by him and Mr. Himmelfarb under the fiscal year basis? A. Yes.

Q. By the way, did you thereafter investigate and see Exhibit 6 that is in evidence here? I will get it for you if you are not familiar with it.

A. Yes, I am familiar with it. We didn't investigate his tax liability for 1945 and that pertains to the years 1944 and 1945 where there was an overlap of years on a fiscal basis.

The Court: Did you see Exhibit 6?

The Witness: Yes, I am familiar with it. [1089]

Q. (By Mr. Robnett): And isn't it a fact that he told you that by reason of the fact that the business reported in that fiscal year, on that fiscal year basis, did not begin until May 1944 and that they were adopting a fiscal year for it, that it was not

(Testimony of Donald Bircher.)

reported by him in his individual report for the year 1944? A. No.

Q. He didn't tell you that? A. No.

Q. He did tell you that he didn't report it, or any part of it, in his report for 1944, didn't he?

A. Yes.

Q. He told you that at that time?

A. Yes, that is right.

Q. And he also told you, did he not, that he was paying and intended to pay his tax on that money, that was in the fiscal year, according to the fiscal year? A. No.

Q. He didn't tell you that? A. No.

Q. Did you ever in your examination ascertain that that was done?

A. Yes, at another time.

Q. Now at the time of this conference did you make notes of the conversation? [1090]

A. Yes, I made notes of some of them that I embodied in the affidavit. Those are the only notes I made.

Q. Those are the only ones?

A. That is correct.

Q. And you are testifying here then entirely by memory, are you?

A. Yes, but I would like to explain that which will amplify my answer.

The Court: Go ahead.

The Witness: I am testifying from memory as to what was contained in that affidavit but I used that affidavit in preparing another affidavit, a copy

(Testimony of Donald Bircher.)

of which I have here, although they were not worded absolutely verbatim. In substance they were the same, and I have a copy of the second one.

Q. (By Mr. Robnett): That plus your memory is all that you are using for your testimony, is that correct? A. That is correct.

Q. You haven't gone over this matter with anyone else before testifying?

A. Well, we have discussed it of course at the time and many times since.

Q. Who is we?

A. Mr. Phoebus, Mr. Schlick and I.

Q. And you have discussed it since this trial was in [1091] progress, have you not?

A. Yes, generally.

Q. And you have heard Mr. Phoebus' testimony, have you? A. Yes.

Q. And has that testimony in any way refreshed your memory? A. No.

Q. Not at all? A. None.

Q. You remembered everything that you testified to before you heard Mr. Phoebus' testimony?

A. Yes, that is correct.

Q. And as to your conferences or going over the matter with Mr. Schlick and Mr. Phoebus, the many times you say you have, have any of those conferences refreshed your memory with regard to what transpired in that conference? A. No.

Q. Not a bit? A. No.

Q. You remember everything?

A. Yes. We went over them immediately after and made notes the next day and at that moment

(Testimony of Donald Bircher.)

everything was fresh in my mind, so we had our notes at that time and nothing was added to my memory at that time.

Q. And you have not needed to and haven't, I take it, [1092] gone over the notes that were made after that conference that you have just spoken of?

A. We made some notes the next day and I have reviewed those.

Q. You have reviewed those notes?

A. That is, I have reviewed Mr. Schlick's notes, I have reviewed Mr. Phoebus' notes and we have had general conversations about what was in them.

Q. In the reviews of those notes of Mr. Schlick, did they in any way refresh your memory of anything that happened in that conference?

A. No.

Q. And in your review of the notes of Mr. Phoebus, have they in any way refreshed your memory as to what happened at that conference?

A. No, I think not.

The Court: You made a report on this, did you?

The Witness: Yes.

The Court: A formal typewritten report?

The Witness: Yes.

The Court: To your superiors?

The Witness: Yes.

Q. (By Mr. Robnett): When did you make that?

A. I believe sometime about August 1945, the first one. [1093] Then I made a supplemental one later when they asked that we go into the other

(Testimony of Donald Bircher.)

years with Mr. Ormont, and that required a supplemental report.

Q. Anyhow you made the first report in August 1945?

A. That is my recollection. I would have to look it up.

Q. And in making that report, did you make it entirely from memory? A. No.

Q. What did you use then?

A. I had the deputy collector's report before me.

Q. Whose report is that?

A. Deputy Collector Phoebus and Deputy Collector Schlick. They made a report and I had a copy before me. I also had the notes of the conversations that I have related.

Q. And for that report then you did refresh your memory from the notes and reports of those two gentlemen you just named, Mr. Schlick and Mr. Phoebus, did you?

A. Yes, they handled the accounting matters, being deputy collectors, and from the accounting matters I used their figures and their report but I don't think it refreshed my recollection as to what transpired at these interviews.

Q. You have, have you, Mr. Bircher, a very good recollection of what happened on the 24th and what was said?

A. Yes, I think I have. [1094]

Q. Was there ever a time after the 24th of May 1944 when your recollection of what happened at that conference was not clear?

(Testimony of Donald Bircher.)

A. No, I think not.

Q. Never a time? A. No.

Q. Now I will ask you, didn't Mr. Ormont at that conference tell you that he didn't make the collections of any of this so-called extra money, or whatever it was called? A. No.

Q. He didn't tell you that?

A. He said that Himmelfarb did, that he was out buying in the fields and that on occasions he had to make the collections, but Himmelfarb worked in the cooler and usually made the collections.

Q. He told you, did he not, at that time that all of those so-called extra payments were made at the identical time that the invoices were paid or the purchase of whatever the merchandise was, was paid? A. No, he didn't say that.

Q. He did not?

A. No. He said most of them were. Occasionally people came back and paid the extra charges.

Q. He what?

A. He said most of them were paid at the same time [1095] that the invoices were paid, and occasionally people would come back or come at a different time and pay the overcharges. He said the overcharges were not uniform and they fluctuated with the market.

Q. Just a moment. I didn't ask you that.

Isn't it a fact that he told you at that time that if neither he nor Mr. Himmelfarb made any charges of that kind but that that extra money was some-

(Testimony of Donald Bircher.)

times given them or paid to them, one of them, by the customer?

A. No, he didn't say they didn't make any overcharges. He said they preferred to call it gifts or bonuses but that their overcharges were based on the market.

Q. Didn't he tell you that in many instances customers didn't pay anything extra?

A. Yes, he said that.

Q. And didn't he tell you that they didn't even ask such customers for anything extra?

A. I can't say that. Possibly he did say that.

Q. Well, now, Mr. Bircher, isn't it true that Mr. Ormont told you that many customers, that they had bought meat from them and afterwards, after they had bought and paid for the meat, on another day paid them money gifts?

A. He said they came back and paid extra amounts, but I don't know that he said they were gifts because they were plainly overcharges. [1096]

Q. He didn't say they came back and made a payment of an overcharge, did he, after they paid their first bill?

A. Yes.

Q. He used that expression?

A. He said there was side money, side payments, which he preferred to call bonuses or gifts.

Q. Didn't he tell you that most of the money that they had received had been received from people who voluntarily handed the money to them?

A. No, sir.

Q. He didn't tell you that?

(Testimony of Donald Bircher.)

A. There never was that proposition raised, that it was given voluntarily. [1097]

Q. Did he tell you in that conversation that he didn't believe that this money or a lot of the money was even income or taxable income because it was in the nature of gifts?

A. No. He said it might be gambling; I got a lot of extra money and I don't want to tell you what it is; and later he abandoned the idea of gambling, no longer presented the question that it might be profits from gambling, said it was overcharges, side money.

Q. Said it was overcharges?

A. That is correct.

Q. And he told you they kept no books on it?

A. That is correct.

Q. He told you that it wasn't entered on the books of the Acme Meat Company?

A. That is correct.

Q. Didn't he tell you that it didn't belong to the Acme Meat Company and that is why it wasn't entered on the books?

A. No, he didn't. Do you want me to tell you why he said it wasn't?

Q. Just answer the question. Didn't he tell you that the memoranda he had in the book you have mentioned Friday was the only record he knew of of those collections?

A. No, he didn't say that.

Q. He didn't say that? [1098]

(Testimony of Donald Bircher.)

A. No. He said Himmelfarb had a similar record.

Q. A similar record? A. That is right.

Q. Then he did tell you, did he not, that the record he had in that book and a similar record that Mr. Himmelfarb had were the only records that he knew of of those collections?

A. That is correct.

Q. He readily handed you the book when you asked for it, didn't he? A. No.

Q. He did hand it to you? A. Yes.

Q. And you then made a copy from that book of what it contained on that subject, did you?

A. Yes. As a matter of fact, he held it in his own hand. He didn't hand it to me.

Q. Just a moment. I just wish to have you answer questions.

Now that copy that you made is Exhibit 53, I believe.

(The document referred to was passed to counsel.)

Q. (By Mr. Robnett): I will show you Government's Exhibit 53, which is a small page fastened to this larger page. The small page is the copy that you made from the book he handed you, is it? A. Yes. [1099]

Q. Now, Mr. Bircher, did that contain all that was in the book that he handed you? I mean the page or whatever you were copying from.

A. Yes. In addition there are some notes that

(Testimony of Donald Bircher.)

the book was gold fabric, or gold paper covered book, and approximately the size of the book, and that is a page from the book.

Q. Now you are referring——

The Court: You mean there were notes in the book?

The Witness: No. We made a little memorandum at the top of this page saying that it was taken from a gold fabric covered book.

Q. (By Mr. Robnett): Just read the part of the memoranda that was not in the book.

A. It says, "Gold notebook, 11½ inches by 21½ inches," I guess it is.

Q. You wrote that, did you?

A. No, I think that is Mr. Phoebus' handwriting. He was there present.

Q. Those two first lines on there in any event, those were not in the book?

A. That is correct.

Q. But all the rest was?

A. Yes, except the dots, those four dots after the [1100] amounts. Otherwise, it is exactly the same as the book.

Q. And that contains all that was on the page you were copying from?

A. That is correct. There were no dollar signs on the figures, as you can see, but just the dates and the amounts.

Q. I mean, this is an exact copy of all that is on that page?

A. That is correct.

(Testimony of Donald Bircher.)

Q. And he told you that that page was the only record he had, didn't he? A. Yes.

Q. And he told you that early in the conversation, did he not?

A. Yes. I don't know whether it is early or in the middle of it.

Q. Well, as you related the conversation the other day, was that the chronology of it?

A. Yes.

Q. Now as you related the conversation the other day, there was very little, if anything, said by anyone in that conference but by Mr. Ormont. Was that the way that the conference was held and what happened there?

A. I asked most of the questions, he made most of the answers, did most of the talking.

Q. Did you ask him questions? [1101]

A. Yes.

Q. You didn't give them the other day, you gave just one or two. A. That is correct.

Q. You were asked to give the conversation but you didn't give the questions or what you said, did you? A. No, not all of them.

Q. You were only giving what you remembered Mr. Ormont saying. That was chiefly what you were doing? A. I believe so.

Q. He told you, did he not, that you could have free access to all the books and records of the Acme Meat Company? A. Yes.

Q. And was that before or after you had made the copy, Exhibit 53?

(Testimony of Donald Bircher.)

A. Both before and after.

Q. And he told you, did he not, that he and Mr. Himmelfarb considered and treated this arrangement on these collections as a joint venture?

A. No, he didn't say that.

Q. He didn't mention joint venture at all?

A. Yes, he did mention joint venture, but he didn't say that they treated it as that. It was a different explanation.

Q. He said, did he not, that it was similar to a joint venture? [1102]

A. Are you talking about overcharges or the Acme Meat Company or both?

Q. No, I am talking about the so-called collection, whether they are overcharges or not, not the business of the Acme Meat Company, but this business between he and Mr. Himmelfarb on this fiscal year matter.

A. He didn't differentiate between the business of the Acme Meat Company and their overcharge collections; he merely said that in the Acme Meat Company they were to share their profits equally after the first \$24,000, after which the legitimate profits of the business were to go to Mr. Ormont; that in addition they had this side venture of collecting overcharges and they would share 50-50 on those.

Q. He did say that this was a side venture, didn't he?

A. No, it was all part of the same business.

Q. Just a moment. Will you answer it yes or no?

A. No, he didn't say that.

(Testimony of Donald Bircher.)

Q. He didn't? A. No.

The Court: Read the witness' last answer.

(The answer referred to was read by the reporter, as follows

("A. He didn't differentiate between the business of the Acme Meat Company and their overcharge collections; he merely [1103] said that in the Acme Meat Company they were to share their profits equally after the first \$24,000, after which the legitimate profits of the business were to go to Mr. Ormont; that in addition they had this side venture of collecting overcharges and they would share 50-50 on those.")

Q. (By Mr. Robnett): Do you remember giving that statement?

A. Yes. That doesn't explain it entirely, I don't believe, the answer.

The Court: Did he tell you it was a side venture?

The Witness: He said it was part of the same venture but part of their joint enterprises to run the Acme Meat Company and to have these extra activities of collecting overcharges. I don't think he drew any line between the two. It was all part of their joint business venture, the Acme Meat Company venture.

Q. (By Mr. Robnett): He did say what you just testified to a moment ago?

A. Just as I have indicated and explained.

(Testimony of Donald Bircher.)

Q. All right. Now he told you, did he not, that in the matter of this side venture, that what they collected, he or Mr. Himmelfarb collected, depended entirely on the willingness of the customer? Answer that yes or no. A. No.

Q. He did tell you that it was according to the willingness [1104] of the customer, didn't he?

A. No.

Q. He never mentioned that? A. No.

Q. Never said anything about the willingness of the customers to pay?

A. No, sir. He said, according to the market, whatever the market was, how much he could get from the customers.

Q. He did tell you, didn't he, that the question of collection of those extra charges was how much the customers were willing to pay on the side?

A. No.

Q. He never said that? A. No.

Q. When you were testifying Friday you aimed to give us accurately according to your memory what was said, didn't you? A. Yes.

Q. You knew then, did you not, that Mr. Ormont was on trial here in a criminal case?

Mr. Strong: I object to that.

The Witness: Yes.

Mr. Strong: He knows, everybody knows. It is no secret.

Q. (By Mr. Robnett): Now I am going to ask you to look at your testimony [1105] that you gave

Friday, page 1045, and ask you to look at lines 14 to 17.

A. (Examining transcript)

Q. Start with line 11 to 17. A. Yes.

Q. Did you give that testimony? A. Yes.

Mr. Strong: So stipulated.

Q. (By Mr. Robnett): And in that testimony on Friday you said:

“He said that the side charges or collections from the customers of the Acme Meat Company had not been uniform, had not been determined on the basis of so much per pound, that the overcharges or excess charges which had not been recorded in their books or records fluctuated and determined on the market how much the customers were willing to pay on the side.”

A. Yes, that is correct.

Q. Now in his conference with you gentlemen he told you, did he not, that the only thing he would ask of you was that you not divulge anything he told you because it might embarrass him with other departments?

A. I don't understand that question.

Mr. Strong: That has been asked and answered.

The Court: Yes, it has been asked and answered. [1106]

Mr. Robnett: What was that?

The Court: I think that question was asked earlier this morning by you.

Mr. Robnett: Very well.

(Testimony of Donald Bircher.)

Q. Isn't it true that in his statement at that conference he used the expression, with regard to these collections, that they were merely unrecorded collections?

A. No.

Q. He never used the expression "unrecorded collections"?

A. Yes. That is one of the words he used. That isn't the only word he used to describe that.

Q. He did use that?

A. Yes.

Q. And he referred to the collections in general as unrecorded collections, didn't he?

A. He said they were side money payments received.

Q. Just answer my question, please.

I move to strike out the answer as not responsive.

The Court: He answered it yes.

Mr. Strong: May he explain? It sounds like he wants to explain it.

The Court: No, he has explained it. It is just a repetition.

Q. (By Mr. Robnett): Didn't he tell you at that time [1107] that sometimes those side payments were made by checks?

A. Yes, sir.

Q. Now you testified with regard to a conversation you had with the defendant at the bank the time you took a list of bonds. Do you recall that conversation?

A. Yes.

Q. There was present at that conversation who?

A. Mr. Ormont, his accountant Mr. Malin, Deputy Collector Phoebus and myself.

Q. Now you said at that time that the defendant

(Testimony of Donald Bircher.)

made a statement to you about having invested this extra money in government bonds. A. Yes.

Q. Was that before or after you had checked the list of bonds? A. That was after.

Q. After you had checked it?

A. Yes, in front of the bank.

Q. And you had examined the bonds, had you, while they were checking them? A. Yes.

Q. You looked at them and the face of them and the dates of them?

A. I didn't handle them, I stood over the accountant who worked in front of me. Mr. Ormont and I stood over him [1108] and watched him to see that he got the right numbers down and the detail.

Q. And he took the dates down? A. Yes.

Q. And you noticed him putting the dates down?

A. Yes.

Q. Did you observe the dates?

A. Yes, I observed principally the payee and the number of the bond, the denomination, the amount.

Q. But I am asking if you observed the dates of the bonds. A. I don't recall it in detail.

Q. In making up the list, did they list them according to years that they were purchased or as they were dated?

A. He listed them the way they come out of the box, one and then the next, regardless of dates.

Q. Now he had previously told you, you say, that he had collected from these side moneys about \$35,000 or \$36,000, had he? A. Yes.

(Testimony of Donald Bircher.)

Q. And did he tell you at that time that he had put that money into government bonds?

A. He said that he put most of his money payments, receipts, into government bonds, and that he also put other funds that he had accumulated in prior years from savings [1109] into government bonds. He had about \$100,000, about \$96,000 of cost of bonds in his box.

The Court: You mean he told you that before he went out there, that he had about \$96,000 in bonds?

The Witness: No, that is after we inventoried the box, added them up.

The Court: His question was whether or not he told you before you went out there that he had put his side money into bonds.

The Witness: No, he didn't tell us that.

Q. (By Mr. Robnett): This happened out there after you had checked the bonds?

A. That is right.

Q. He told you at that time also, you say, that he had accumulation of savings over a course of years and he had invested that in bonds, didn't he?

A. Yes.

Q. And isn't it true now, Mr. Bircher, that at that time instead of Mr. Ormont telling you had invested this side money in bonds, that it was Mr. Malin that told you, "Well, at least the man has been patriotic, he has invested his money in government bonds," or words to that effect?

A. No, that is not right. Mr. Ormont explained that to me with some emphasis. [1110]

(Testimony of Donald Bircher.)

Q. He did? A. Yes.

Q. He is the one? A. Yes.

Q. And were these parties all present when he did that?

A. Mr. Ormont and I were standing aside, he was telling me something about his physical prowess——

Q. Just a moment. A. We were alone.

Q. I asked you, was there anyone else present besides you and Mr. Ormont when that was said.

A. We were standing together——

The Court: No, wait a minute.

The Witness: No.

The Court: All right.

Q. (By Mr. Robnett): What was that?

A. No. The others were five feet away or three feet away.

Q. Were you in the same room?

A. We were standing out on the sidewalk in front of the bank.

Q. Were the others that you say were there, were they outside or inside?

A. They were outside for the most part, one of them [1111] might have been just coming out, I don't remember, but there were others standing within a few feet of us, and Mr. Ormont told me that when we were just together. The others were two or three feet away.

Q. Mr. Ormont did not in any of those conferences or conversations tell you that he—withdraw that.

(Testimony of Donald Bircher.)

Let me ask you, Mr. Bircher: You have not been very friendly to Mr. Ormont since about the 24th or 25th day of May, 1945, have you? Will you answer that yes or no, please? A. Yes.

Q. You have been just as friendly as you were before that?

A. Yes, indifferent, I would say. I mean I don't hold any grudge. This is just my work. It doesn't mean anything to me, the fact that we had an argument. [1112]

Q. I will ask you if on the 24th day of May, 1945 down at the plant, if you didn't tell Mr. Ormont, in words and effect, "I will get you for this," or something to that effect? A. Certainly not.

Q. You didn't say anything of that sort?

A. No, sir; never.

Mr. Robnett: That is all. Thank you.

The Court: Mr. Katz?

Mr. Katz: No questions, if the Court please.

The Court: Redirect?

Mr. Strong: Just one question.

Redirect Examination

By Mr. Strong:

Q. With reference to the conversation that Mr. Robnett asked you about concerning a statement purported to have been made by Mr. Ormont as to what his chief concern was in reporting the money, and you answered yes, and his Honor said you could explain on redirect, would you please explain what was said?

(Testimony of Donald Bircher.)

Mr. Robnett: I object to that on the ground it has been asked and answered, not proper redirect examination.

The Court: I think that is pretty broad.

Q. (By Mr. Strong): State what was said with reference to that. [1113]

A. Mr. Ormont said——

Mr. Robnett: Just a moment. I object to that. I don't believe it is redirect. It is an improper question, incompetent, irrelevant and immaterial. It has been asked and answered on direct as well as on cross.

The Court: He was asked on direct what the conversation was, you asked him on cross whether he didn't say such-and-such in addition to what he said, and he said yes. Therefore that is new matter that was brought out on cross-examination.

If you can remember what the question is, or what the conversation was he is talking about, you can answer it.

Mr. Strong: The only one I want to know is where his Honor said I could ask you on redirect.

The Court: Go ahead.

The Witness: Mr. Ormont said that his principal concern was with the thought that the Government might cancel the license of the Acme Meat Company.

Mr. Robnett: He has already testified to that.

The Court: He already testified to that on direct. He went all over that about the license of

(Testimony of Donald Bircher.)

the Acme Meat Company, subsidies, and so forth. If that is the explanation, he has already given that.

Q. (By Mr. Strong): You have already given that? A. Yes. [1114]

Mr. Strong: That is all.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Strong: At this time, your Honor, I would like to offer in evidence Government's Exhibit 40-B for identification, which is the verbatim transcript of the Acme Meat Company records. I won't go into what it says.

Mr. Katz: If the Court please, that is objected to. There has been no foundation laid for it; it is hearsay, incompetent, irrelevant and immaterial, no basis for its admission as to any issue in this case.

The Court: Let me see Exhibit 50 and 51.

(The documents referred to were passed to the Court.)

The Court: I do not believe there has been sufficient foundation laid for this.

Mr. Strong: Shall I argue it or is prior argument sufficient? It is the same argument.

The Court: Same ruling. Objection sustained.

Mr. Strong: I offer in evidence Government's Exhibits 46 and 47, which are the comparative statements of net worth.

The Court: The objection is sustained as to the

defendant Himmelfarb. This is, however, admissible against the defendant Ormont.

Mr. Robnett: I would object to it, if the Court please, as [1115] hearsay, incompetent, irrelevant and immaterial, no foundation laid for its admission as to Mr. Ormont.

The Court: Let me think about it. You offer 46 and 47?

Mr. Strong: Yes, your Honor. That is the summaries.

The Court: Any objection?

Mr. Robnett: Yes, there will be.

Mr. Katz: I don't know which summaries he is referring to.

The Court: These are as to both.

Mr. Strong: May we separate them?

The Court: No. 46 is Sam Ormont, but there is one page on that that I do not think belongs in that file. It is a different year.

Mr. Strong: May I remove it physically?

No. 47 is now only Sam Ormont. I offer it as to both all the time now.

Mr. Robnett: May I see them?

The Court: Yes. These are the documents counsel handed out at the beginning of the trial in order to follow the testimony of the witness Eustice.

Mr. Katz: As to the defendant Himmelfarb, we object to them on the ground it is hearsay, no foundation laid, not within the issues.

The Court: I will reserve the ruling on that objection.

Do you have any other witnesses? [1116]

Mr. Strong: No, unless some of these documents go in. I should say this, if some of these documents go in then I will have witnesses.

The Court: I see.

Mr. Strong: What about 40-B, your Honor? Was that in as to the defendant Himmelfarb or as to Ormont only?

The Court: I hadn't ruled on that. I sustained the objection as to Himmelfarb, and Mr. Robnett made the objection that there was no foundation laid, and I was trying to recall the testimony concerning that foundation as to that document.

Mr. Strong: I will withdraw the offer as to Ormont just to save time.

The Court: Very well.

Mr. Robnett: Now as to Exhibit 46, if the Court please, I object to this on the ground that it is incompetent, irrelevant and immaterial, and it is hearsay as to this defendant and is a mere self-serving declaration by the witness for the prosecution and is in no way binding upon the defendant, and that no proper foundation has been laid for its admission. It purportedly would be from books and records that are not in evidence and they would be the best records of what they contained, and they couldn't make it up without the use of them. They are not in evidence in this case. And the other records and things from which they were made, according to the witness Eustice, was hearsay as to him and incompetent, irrelevant and immaterial as to this defendant and hearsay as to this [1117] defendant.

I would like to interpose the same objection that I have just made to Exhibit 46, to Exhibit 47.

The Court: Those two documents are compilations made by the witness Eustice in support of the Government's contentions as to the amount of tax. I am familiar with the case, *United States v Schenck*, in the Second Circuit which sustained the admissibility of such documents.

Mr. Strong: Also the Vomansky case and a large number of others?

The Court: That is the leading case on the subject.

Mr. Strong: Yes.

The Court: The Ninth Circuit, however, has not yet said it is. I do not think it is good law. It is really argument. I think all of the objections which counsel made are good as against it. I think if it goes into the record it is highly prejudicial of the defendant's rights, and also it would be conducive to an improper verdict because the burden on the Government is not to establish those precise amounts and those precise classifications, and in my judgment it might divert the jury from an appropriate verdict of guilty, should one be indicated in the case, because they might not agree with some of the figures.

The objection is sustained.

Mr. Strong: I don't suppose there will be any point to [1118] my offering argument on a legal basis since your Honor has indicated you are familiar with the cases?

The Court: I am pretty familiar with the cases

and their logic and their reasoning, and until the Ninth Circuit tells me I have to admit that kind of evidence I am not going to admit it.

Mr. Strong: I offer in evidence Government's Exhibit 36-B, which is a transcript of the bank account of Phillip Himmelfarb; also Government's Exhibit 36-C for identification, also a transcript of the bank account of Phillip Himmelfarb.

Mr. Robnett: As to Mr. Ormont, I want to object to both of them as hearsay, incompetent, irrelevant and immaterial, if the Court please, not binding on him, and that they are seeking outside hearsay testimony.

The Court: Mr. Strong, are these all of the exhibits which you have had marked for identification relating to the defendant Himmelfarb?

Mr. Strong: These are the only ones not admitted in evidence.

The Court: You will have a motion to make concerning all of the evidence that has been excluded, I take it?

Mr. Strong: Yes, your Honor. That hasn't been excluded; it hasn't been offered so it hasn't been excluded.

The Court: I mean all of the evidence which was excluded as to the defendant Himmelfarb. [1119]

Mr. Strong: I will take that up next.

The Court: I was thinking, that being the case I would like to hear some argument in connection with the matter from both sides, so I will reserve my ruling on these two exhibits, and excuse the jury until 2:00 o'clock, and hear your motion.

Mr. Strong: May we have a recess now?

The Court: Very well. The jury are excused until 2:00 o'clock.

(The jury retired from the courtroom at 11:35 o'clock a.m.)

(Short recess.) [1120]

Mr. Strong: At this time, I would like to make a motion to apply to all the testimony given on this trial with reference to the income, and returns, for the year 1944; apply that testimony to the defendant Himmelfarb, whether that testimony was given in the presence of Mr. Himmelfarb, that is, whether statements and acts took place in the presence of the defendant Himmelfarb, or out of his presence.

In that connection I want to point out these facts: The indictment, as to 1944, contains two counts, Count 1 and Count 2. In Count 1 it is charged that both defendants violated the law with reference to the income tax return for 1944 of Sam Ormont. Count 2 charges that both defendants violated the law, as there stated in the indictment, as to the income tax and return for the year 1944 of the defendant Himmelfarb.

In effect, as to each of these counts, it is charged that they operated together, and that is practically the same as alleging a conspiracy. In other words, it is a scheme in operation between two parties to produce a result with reference to the income tax return for each one of the two for that year.

The Court: A scheme is not alleged, however. It seems to me, the first thing to be determined is as

to whether or not the evidence is admissible as against the defendant Himmelfarb at this time. There is evidence in the record which the Circuit Court characterizes as substantial evidence, [1121] from which a jury of reasonable men and women, could conclude, beyond a reasonable doubt, that Phillip Himmelfarb—no, I don't think it goes that far. I think, if there is some evidence in the record there would be *corpus delicti*, because the standard I have just announced is the standard I must apply upon a motion for a judgment of acquittal. Is there some evidence in the record from which it could be said that Phillip Himmelfarb committed the acts alleged in Count 1 and in Count 2?

Mr. Strong: In that connection I will point out this evidence, your Honor: First of all there is the calendar year return filed by the defendant Phillip Himmelfarb, which is Government's Exhibit 4, which purports to show the entire income for the year 1944, and it purports to show the tax.

There is also here the return of his wife, Ruth Himmelfarb, showing her distributable share of the community income, and the amount of money shown as tax as to her. That shows a sum for the defendant Phillip Himmelfarb of approximately four thousand and some odd dollars—less than five thousand dollars. Then there is in evidence Government's Exhibit 6, which is a return filed by the defendant, and showing on its face that it covers a period from May 1st, 1944, to April 30, 1945. On its face it shows that it covers a period of eight months in 1944. On its face it shows that the addi-

tional money received as income by the defendants Sam Ormont and Phillip Himmelfarb, jointly, in this operation was seventy-one [1122] odd thousand dollars. And it also shows on its face that 50 per cent of that money went to the defendant Himmelfarb—the sum of \$35,694.32.

So we have in evidence, just on the basis of two returns, a certain amount reported in 1944, for the calendar year, and the return subsequently filed of the so-called fiscal year return, showing simple income of more than \$35,000 for the defendant Phillip Himmelfarb. I think those two documents, in view of the fact——

The Court: Yes, I think that the returns of 1944, filed by Himmelfarb, and the joint venture return, Exhibit 6, are sufficient, together with the letter signed by Himmelfarb, Exhibit 50-A, B, C and D—or is it 51?

Mr. Strong: The letter as to Himmelfarb is 50-A, B, C and D. The letter, or statement signed by him.

The Court: They are all part of the same letter, because the testimony was that they were all received at the same time, and together.

Mr. Strong: Yes.

The Court: I hold there was sufficient foundation to admit the letter, and I think the three of them together would be sufficient, unless Mr. Katz can convince me otherwise. That is, on Count 2. That's the income tax return of Phillip Himmelfarb.

Mr. Strong: That's right, your Honor. [1123]

The Court: On Count 1, I don't think there is sufficient evidence to grant your motion with relation to the defendant Himmelfarb.

Mr. Strong: As to Count 2, I want to point out just one further item. There is definite testimony that the defendant Phillip Himmelfarb held himself out as a partner in the Acme Meat Company.

The Court: That is on Count 2?

Mr. Strong: That is on Count 2, yes.

The Court: On Count 1, I don't think I can admit the testimony in the case concerning the defendant Phillip Himmelfarb. There is not anything to show in Count 1 that the defendant Phillip Himmelfarb had anything to do with Ormont's return for 1944; that is, his failure to return.

Mr. Strong: That part is covered in the offer of proof, which your Honor has rejected.

The Court: Yes.

Mr. Katz: If the Court please, I believe that the only matter we need address ourselves to here is in Count 2; as has been pointed out by your Honor, there is no evidence with which to connect the defendant Himmelfarb with the preparation of the Ormont return; nothing to show he had anything whatsoever to do with it.

With respect to Count 2, and with respect to this motion, I take it that it is obvious that in determining the motion, [1124] the only evidence that may be considered is that which is in the record as against the defendant Himmelfarb, and that we cannot take into consideration any evidence that

is in the record against the defendant Ormont in submitting the motion.

First and foremost I wish to point out to the Court that in respect to the matter of the admission of evidence received against one defendant, which is sought subsequently to be applied against another defendant, that that cannot be done for a number of reasons: First, the defendant Himmelfarb had a right to object to each question and answer asked of and made by the witness, upon which such evidence was excluded. To attempt to apply evidence which was excluded on the basis of a given objection would deprive the defendant of that right to exclude it upon such other ground as may exist therefor, which were not made, and could not have been made, because it had been excluded upon another valid ground.

Secondly, that Himmelfarb has the right to cross-examine each witness.

The Court: You may have that right now.

Mr. Katz: If the motion granted?

The Court: In the granting of the motion, you are entitled to call witnesses back and cross-examine them.

Mr. Katz: Because, until such time, there was not any evidence before the Court with respect to which any cross-examination could be had. [1125]

The Court: And, so far as your objections are concerned, your objection was broad enough to cover any which might have existed. In other words, you did not base your objection solely upon the ground that no foundation was laid. You included the ob-

jections that it was incompetent, irrelevant and immaterial, hearsay, and so forth. And I tried to make my rulings to make it clear that upon each occasion, where I sustained an objection, that I sustained it only upon the ground that no foundation had been laid.

Mr. Katz: Yes, I appreciate that.

The Court: So that took the other objections as overruled—the other grounds of objection, except in one specific instance, where I indicated this morning I was not ruling on the rest of them.

Mr. Katz: I have in mind this, your Honor: Where a particular line of testimony has been ruled out, as against a defendant, that subsequent questioning on this line—as a matter of fact, some of the evidence was not offered at the time against the defendant—that the particular questions that were then being asked, insofar as being objectionable, on other grounds, were no longer matters of concern to the defendant Himmelfarb, for the reason that they were not being offered as against him, but were being excluded by reason of the ruling.

The Court: I think it was obvious that why counsel was [1126] not then offering them was to save the time of the objection. In other words, he recognized the ruling which I had made, that there was no foundation established, and rather than offer them and possibly prejudice your client in front of the jury as to each offer against him, he abided the ruling of the Court, and I think the record of the trial will show—I don't think the jury could possibly get the idea that he did not intend

that they should not apply to the defendant Himmelfarb, for the reason that he stated that at the appropriate time he would ask that all the testimony——

Mr. Katz: My objection is not that it was not offered against the defendant Himmelfarb with the intention not to apply; my objection is that it was not offered against him, and because the particular matter was not offered, it is not of concern, and that the defendant could not properly object to the particular question, because it was not offered against him, even though a valid ground for objection might have existed as to him. I have made it, and it certainly did exist, and I take the same view with respect to the line of testimony which was excluded, where the questioning continued against a particular defendant. I believe the questions were objectionable, but no objection was interposed on behalf of the defendant Himmelfarb, because the evidence was being excluded against him, by reason of the objection having been made at the outset. [1127]

There is only one other thing of concern, and that is, if the Court please, the matter of applying testimony that came in as against one defendant to another. I have pointed out to your Honor that it is necessary for the Government making such motion, to specifically point out and designate which portion of the record, which portion of the witness' testimony, is sought to be elicited, because even though it might be, which is not my position—my position is it all should be excluded—but, even if we assume that part of it can properly be applied,

there is still parts and portions of the testimony which cannot in any event be applied.

The Court: As for instance?

Mr. Katz: As, for instance, the matter of the testimony of the witness Eustice, based upon working papers, which were not prepared in part by him, but in part by someone else. They were proven in this court room to have been inaccurate, based upon hearsay, based in part upon examination of documents, and papers, not in evidence before this Court, and that that examination included matters dehors the record. That in addition to those facts with respect to the working papers, they were based upon assumptions, based upon speculation, based upon guess, and were not admissible, in my opinion, in the face of an objection properly made.

The Court: Which papers are not in evidence?

Mr. Katz: The testimony is, your Honor. [1128]

The Court: The testimony was used to refresh his recollection. As a matter of fact, the Government could not offer working papers in evidence, under the rule.

Mr. Katz: It was strictly hearsay, and as to none of these matters could his recollection be refreshed, because he had no original knowledge with respect to them. So in my opinion it is not correct, nor is it accurate, nor is it proper, to state, with reference to testimony such as the witness gave from the working papers, that these were not admitted into evidence. Actually the result was that there was indirectly presented into evidence, if I may use the word, under the guise of being his working papers

used to refresh his recollection, that which could not refresh his recollection, except as to part of it.

The Court: In counsel's motion I think he probably neglected to specify it, but by virtue of the allegations in the indictment, a motion can be made to include only the testimony of the witness relating to 1944, concerning Phillip Himmelfarb?

Mr. Strong: I so said, your Honor. I limited it.

The Court: It is only that testimony. It is not the testimony of Eustice, or any other witness, concerning 1942 and 1943; it is only the testimony of the witness that applies to Himmelfarb's return; not to Ormont's return, for 1944.

I have indicated I will deny that motion, so it is only [1129] that testimony in the record given by a witness concerning Himmelfarb's 1944 return that is admitted.

Obviously, the testimony of any witness concerning Sam Ormont in 1942 and 1943, not only concerns his actual acts and conduct, but his state of mind, to-wit: His wilfulness, and cannot be applied to the defendant Himmelfarb, and an appropriate instruction should be prepared to advise the jury, because you have the defendants charged in some counts, but not in others.

Mr. Katz: As to this, the very question and point I am trying to make, is this: In order to apply such testimony it is first necessary that we differentiate and distinguish evidence that came in with respect to 1942 and 1943 from matters that came into 1944. And further it is necessary to take as to 1944, the testimony of Eustice.

The Court: But not as to the defendant Himmelfarb.

Mr. Katz: He did not testify as to the defendant Himmelfarb.

The Court: As to prior to 1944?

Mr. Katz: He did not testify as against the defendant Himmelfarb in 1944 either. Neither did the witness Phoebus.

The Court: I guess that is right.

Mr. Katz: Neither did the witness Bircher; neither did the witness Link; neither did any of the witnesses in this case, if the Court please, and that is the point I am trying [1130] to make.

If your Honor were to say we will apply the testimony that came in, it can't be testimony which came in against Himmelfarb, because it is already in against him. If the testimony came in against Ormont, you won't apply that against Himmelfarb. I think the Court would want to know what evidence is going to be so applied.

The Court: Yes, I am inclined to think counsel ought to specify the particular testimony. Or did you make your motion as to all of the testimony, Mr. Strong?

Mr. Strong: I move that all of the testimony with reference to the income for the year 1944—

The Court: That is, all testimony relating to the conduct of Sam Ormont and Phillip Himmelfarb to the year 1944.

Mr. Strong: Yes, because they are jointly charged in that count. I think it should be left. The

jury should decide whether that conduct and testimony demonstrated violation by one or both or neither.

The Court: It looks to me like there is no sufficient testimony to connect Sam Ormont with Count 2. In other words, if the defendant would make a motion for judgment of acquittal as to Sam Ormont, as to Count 2, I think I would have to grant it. As to the defendant Himmelfarb for 1944, as to Count 1, that again is another subject which counsel will probably move on, and we will have to discuss it. But as to Count 2, I [1131] don't see any testimony in the records that connects it.

Mr. Strong: May I point out that the count relates to the income of both. Count 1 relates to the income of the defendant Ormont.

The Court: Let us talk about Count 2.

Mr. Strong: Count 2 relates to the income tax return of Himmelfarb, and his income. The testimony as to conversations between the agent Phoebus, and the agent Bircher, as to earnings during 1944 by Ormont and Himmelfarb, operating, as they claim under their own signature, in Government's Exhibit No. 6, was a joint venture, or any other which they operated—the joint earnings,—that testimony tends to show whether or not the income tax return styled by Phillip Himmelfarb for the calendar year 1944 relates all to his income for that year, or does not.

If Mr Ormont admitted they had a joint venture, a joint enterprise, and both together collected and split the profits of \$70,000 over and above the

amount Mr. Ormont and Mr. Himmelfarb each reported, that, I submit, is evidence which goes to show whether or not there was additional income which they were seeking to keep from the Government. Therefore, the admission of Ormont to either one of the agents as to what the income was which was subsequently distributed——

The Court: Except for the return, Exhibit 6, it seems to me it would all be hearsay, as far as Himmelfarb is concerned. [1132]

Mr. Katz: It is not in the record against us.

Mr. Strong: I am offering it now in support of this motion.

Mr. Katz: What is being done, he is using testimony offered as against Ormont, and not in as against Himmelfarb, as the basis for getting it in. In other words, first he applies it against Himmelfarb, but he can't do that.

Mr. Strong: I am not doing that. Government's Exhibit 6 is signed by the two defendants, and shows that they got \$70,000 more, and that they split the \$70,000, this shows, at least 8/12ths of the \$70,000 was earned before 1944.

The Court: But that does not show, Mr. Strong, that the defendant Sam Ormont wilfully aided or abetted or caused the defendant Phillip Himmelfarb not to report it in that year.

Mr. Strong: Let us forget Sam Ormont in Count 2. I want to apply it to Phillip Himmelfarb.

The Court: I jumped from Himmelfarb to Ormont for the purpose of illustrating the point I was making.

Mr. Strong: This is a joint return, and they both signed it, and by that they can infer further that the joint operation, since it is signed by both, at the same time, and since Mr. Malin testified they did not come to him until the 21st of May, which is at least three days after the conversation——

Mr. Katz: He is bringing in the testimony in the record only against Ormont. [1133]

Mr. Strong: Exhibits 50 and 51 are the same. They are worded almost exactly in the same words, and I think from that it follows that both have the same explanation; they both explain the same information, and say we both at the same place, on the same date had a part in the same transaction, and all that, taken together with the fact that they reported the joint income, is enough for the jury to infer beyond a reasonable doubt that the two defendants were operating in conjunction. [1134]

The Court: If that is the case then we do not need the rest of the testimony admitted as against Himmelfarb to prove your case. I think you probably had better come back then at 2:00 o'clock with some analysis of the testimony and point it out to me more strongly, each of you, and at that time I suppose you will rest, or do you have other witnesses?

Mr. Strong: Well, I am not going to try to re-offer what I have offered, so I probably will rest at that time, your Honor.

The Court: Well, at that time I suppose defense counsel will want to offer their motion for judgment of acquittal.

Mr. Robnett: Yes.

The Court: And argument?

Mr. Robnett: Yes.

The Court: Very well. We will recess until 2:00 o'clock.

(Whereupon, at 12:15 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same date.) [1135]

Los Angeles, California, June 10, 1947

2:00 o'Clock P.M.

(The following proceedings were had outside the presence of the jury:)

The Court: The defendants are present and are ready to proceed in United States vs. Ormott?

Mr. Strong: Yes, your Honor.

Mr. Robnett: So stipulated.

The Court: Mr. Strong.

Mr. Strong: With reference to the specific evidence which we now request your Honor to apply——

The Court: Incidentally, I will deny your motion to apply all of the evidence.

Mr. Strong: Yes. I thought that was what was happening.

The Court: That is as to the defendant Phillip Himmelfarb.

Mr. Strong: May I read these off, your Honor, and then we can take them up if you desire one by one?

The Court: The volume and page?

Mr. Strong: Yes, sir.

Page 902, lines 19 to 23 inclusive.

Page 904, lines 9 to 10 inclusive, and line 13 to the end of the page.

Page 905, line 1, line 9 to the end of the page.

Page 906, [1136] line 1 through line 8 inclusive, line 10 to the end of the page.

Page 908, line 20 to the end of the page.

Page 909, the entire page.

Page 910, the entire page; that is, from line 21 inclusive.

Page 911, lines 5 to 10 inclusive.

Page 913, lines 12 to 17 inclusive.

Page 914, lines 10 to 13 inclusive.

Page 916, lines 6 to 14 inclusive, lines 22 to the end of the page.

Page 917, the entire page up to line 17.

Page 918, lines 2 to 6 inclusive, lines 9 to 11 inclusive.

Page 919, lines 1 to 16 inclusive.

Page 920, the entire page.

Page 921, lines 1 to 8 inclusive, lines 11 to 15 inclusive, lines 20 to the end of the page.

Page 922, lines 1 through line 9, lines 18 and 19.

Page 923, lines 6 and 7, lines 12 to 15 inclusive.

Page 924, lines 1 to line 24 inclusive.

Page 925, lines 18 to the end of the page.

Page 926, lines 1 to line 15 inclusive, line 25.

Page 927, the entire page.

Page 928, lines 1 through line 13 inclusive, line 19 to [1137] the end of the page.

Page 929, from line 1 to line 9 inclusive, line 22 to the end of the page.

Page 930, the entire page.

That is the testimony of the witness Phoebus.

Now the testimony of the witness Bircher, page 1042, line 3 to line 3 to line 16 inclusive, lines 20 to 22 inclusive.

Page 1043, the entire page with the exception of the first two lines.

Page 1044, the entire page.

Page 1045, the entire page. [1138]

1046, the entire page;

1047, line 1 to line 11, inclusive;

Line 17 to the bottom of the page.

1048, the entire page;

1049, the entire page;

1050, the entire page, except line 25.

The Court: What you are doing is offering all of Bircher's testimony?

Mr. Strong: That's right to page 1057 inclusive.

Then page 1061, lines 10 to 12, inclusive.

The Court: What you are offering is Bircher's testimony up to page 1057?

Mr. Strong: Inclusive.

The Court: That begins on page 1042 to 1057?

Mr. Strong: Yes.

The Court: And on page 1061?

Mr. Strong: Page 1061, lines 10 to 12—10 to 12, inclusive.

In addition to that, beginning on page 985, all of Mr. Malin's testimony which was admitted is being

offered as against the defendant Himmelfarb at this time.

The Court: All of Malin's?

Mr. Strong: Yes. Some of these documents were admitted as against the defendant Ormont. That is, one of these two sets, Exhibits 50 and 51; your Honor admitted the ones which Mr. [1139] Ormont signed, against Mr. Himmelfarb, and the one Mr. Himmelfarb signed against Mr. Ormont. In connection with this testimony I now offer the document signed by Mr. Ormont against the defendant Himmelfarb, and the one signed by the defendant Himmelfarb against Mr. Ormont.

Mr. Malin's testimony goes on to the next volume. That testimony is being offered as I indicated to your Honor.

The Court: Taking Malin's testimony first——

Mr. Strong: That begins on page 985. I might say just a word in explanation. Mr. Malin's testimony relates primarily to the fiscal year return, which is Government's Exhibit No. 6, and the work he did in connection with it, which is Government's Exhibits 50 and 51. [1140]

The Court: Well, it seems to me that the question of the admissibility of the testimony of Mr. Phoebus and the testimony of Mr. Bircher against the defendant Himmelfarb must turn on the proposition as to whether or not the presence of Malin, the accountant, the agent of the attorney for Himmelfarb and Ormont, at those conversations would modify the hearsay rule as to Himmelfarb, because Himmelfarb was not present at the conversation

with Phoebus which you have offered nor the testimony of Mr. Bircher, to which I sustained an objection so far as Himmelfarb was concerned.

What have you to say about that, Mr. Katz? In other words, Malin's testimony is now in the record as against Ormont completely and as against the defendant Himmelfarb in so far as the exhibits are concerned. I excluded as to Himmelfarb his conversations with Phoebus and Bircher. If he was the agent of Himmelfarb, doesn't that break down the hearsay rule and make it admissible against the principle, to wit, Himmelfarb?

Mr. Katz: If the Court please, it is my thought that it does not, for this reason: In the first place, the agent that your Honor refers to was the agent of an attorney who was the attorney then for two defendants. Now in the absence of any other evidence—and let's assume now that the presence of an agent would affect the hearsay rule—in the absence of any other evidence the situation is [1141] and must be accepted as one where the agent for the attorney, who was the attorney for two defendants, or if the attorney himself had been there, was there on behalf of one of the defendants with respect to whose matters inquiry was being made.

The Court: No, he wasn't. His testimony was that he was retained by the attorney Mirman to do work in connection with Himmelfarb and Ormont.

Mr. Katz: Right.

The Court: And that he met Himmelfarb and Ormont at the attorney's house and that subse-

quently he had this meeting with Phoebus at which Ormont made some statements to Phoebus.

Mr. Katz: Yes, your Honor.

The point I make to your Honor is this, that as counsel representing two defendants who have questions respecting their separate incomes involved, that an appointment by me with respect to and on behalf of one of them, that I am not then, and particularly an agent who I might send together with one such defendant as to an inquiry being made or a conference being held with him, does not necessarily make me for the purpose of that hearing, nor am I there for the purpose of that hearing, nor would my agent be there for the purpose of that hearing in connection with another defendant whom I may represent. And consequently in the absence, I say, of any showing here that the agent was one who went there for the purpose of representing Himmelfarb—— [1142]

The Court: He was there for the purpose of representing both of them. I think that is the record.

Mr. Katz: The record is [1143] that he was employed by the attorney to do work for both of them.

The Court: And he subsequently conferred with both of them, and subsequently conferred with the agents concerning both of them.

Mr. Katz: Let us assume—there is no evidence here, but let us assume he already called up the accountant and said Mr. Ormont has a conference or appointment scheduled with certain agents at a certain time. Will you go along with Mr. Ormont at that time? There was no conference; nothing, in so

far as the agent of the attorney is concerned, affecting the defendant Ormont.

That is one phase of it. There is another phase. That is the matter of the agent not being one who can abrogate the hearsay rule. The fact that he might have been at a conference, might have talked to someone, is not binding upon such person merely because he was there, and it is the rule in the Federal Court as well as in the State Court, that declarations of third parties concerning a criminal or unlawful act which forms no part of the *res gestae*, are not declarations of the co-partner relating to a conspiracy.

The Court: There is no conspiracy.

Mr. Katz: The declarations and confessions of each conspirator after the offense is completed are not admissible against the co-conspirator. This is a conversation, if the [1144] Court please, subsequent to the filing of the return, charged as against the defendant Himmelfarb, or as against the defendant Ormont, in which Himmelfarb is jointly charged. It is subsequent in point of time. Even if there were a conspiracy, the offense having been completed prior to the time of the conference, the declarations and admissions then would not be admissible under any theory. They would not be admissible, in my opinion, if the defendant Himmelfarb had been there and sat silently by.

The Court: Let me see. Was the witness Malin present on May 15? I am looking at page 902.

Mr. Strong: He does not come in until May 21.

The Court: Malin does not?

Mr. Strong: No; that was what he said.

The Court: He said he was present with Phoebus and Eustice at a conversation at the Acme Meat Company. Where is that referred to in the transcript? That is, Malin said he was present?

Mr. Strong: Page 1001.

The Court: Who is talking now?

Mr. Strong: Malin.

The Court: There is not any conversation introduced concerning that occasion. I don't find any testimony in the record here either by the witness Malin or the witness Phoebus or the witness Bircher, where the defendant Ormont was present [1145] and the defendant Himmelfarb was not, of a conversation by Ormont. In other words, there is testimony where Ormont, Phoebus, Bircher and Eustice and Slick were present at various conversations, but none where the defendant Himmelfarb was present, nor his agent Malin. Neither of them was present at the conversations covered by Mr. Phoebus' testimony, that you have referred to, and neither of them was present at the conversations which Mr. Bircher testified to, as you have indicated, on page 1061.

Mr. Strong: May I be heard further on that before you Honor rejects it? [1146]

The Court: Yes.

Mr. Strong: Mr. Ormont is the agent for the defendant Himmelfarb in those conversations. Mr. Ormont and Mr. Himmelfarb are engaged in the same transaction, which was testified to here by various witnesses. Mr. Ormont and Mr. Himmel-

farb have not only retained the same attorney and the same accountant to file the same returns, and not only have they both signed the same document which they prepared, which relates to the income of \$70,000, but they have both filed almost identical documents—and I think they are identical—letters and the attachments, which are Government's Exhibit 50-D and 51-C, which are the letters, one signed by Ormont and one signed by Himmelfarb, and your Honor will find that they are exactly the same. They are an explanation of the transactions and they are in further concealment of the money.

The affidavits, which are Government's Exhibits 50-C and 51-D, are also in further concealment of the funds——

Mr. Katz: He is now going outside the record again. There is no evidence against the defendant Himmelfarb as to any concealment.

The Court: Let him make his argument.

Mr. Katz: I am sorry.

Mr. Strong: Thank you.

Government's Exhibit 51-D and 50-C, which are affidavits, are also the same type of evidence which shows that the two [1147] defendants are engaged in the same transaction, precisely the same transaction.

The Court: Let me see that document by Phillip Himmelfarb.

(The document referred to was passed to the Court.)

The Court: No, I do not think that Ormont could be the defendant Himmelfarb's agent for the purpose of making these admissions. If this were a con-

spiracy charge the evidence might be admissible, but it is not.

Had the witness Malin been present or an agent of the defendant Himmelfarb whose authority extended to discussions—now Malin was authorized or retained for the purpose of aiding in connection with the Internal Revenue matters, their income tax matters—had the conversations occurred in the presence of that agent I think it would have been admissible. But the record does not show that they were, so the motion is denied.

Mr. Strong: May I say one thing more?

There is evidence to the effect that Mr. Ormont stated to the agents that he had discussed the entire matter of the 1944 return.

The Court: It is still hearsay.

Mr. Strong: And that Mr. Himmelfarb had authorized him to state that he would cooperate, and there were other statements which I don't remember. [1148]

The Court: I know that, but that is still hearsay as to Himmelfarb. The motion is denied.

Do you have any other witnesses?

Mr. Strong: The Government rests, with one exception, I think there may be some documents here.

The Court: There were these two bank statements. I think they are admissible as against Himmelfarb.

Mr. Katz: May I interpose my objection to indicate to the Court why I do not believe they are?

The Court: The bank records?

Mr. Katz: Yes.

The Court: Let me look at them and then I will understand what you are talking about.

(The documents referred to were passed to the Court.)

The Court: Tell me why they are not admissible.

Mr. Katz: They are not admissible for this reason, if the Court please, that with respect to one of the exhibits that your Honor has in his hand, I believe that that is a date subsequent to any time that is in issue in this case, and with respect to both of them other than the statement of the witness Pingree that those are the records of that account, there is no foundation laid. They haven't been connected up with anything any place. No one has testified with respect to those exhibits in any way, shape, form or manner.

The Court: The year 1944 is not in here. Did you have it? [1149]

Mr. Strong: That is part of the other exhibit that is already in evidence. Those, your Honor, were produced at the request of the defendants to complete the picture.

Mr. Katz: They were brought in so that the witness while here could examine them and have all of them before him, so that if they did become material they would be here. But there is no materiality shown.

The Court: At the time I declined to admit these I had in mind that they were before and after the year involved and were thus possibly not material. As far as the foundation is concerned, I think the

foundation has been established because the signature card was produced, signed by the defendant Himmelfarb, and his signature was identified, and it was testified that this was the account on that signature card.

As to whether or not these are material, I am inclined to think they are because from it the Government may argue, or the jury may draw the inference, that his account, having run in this bank at that certain sum during these periods and a subsequent period, is indicative of the commission of the acts charged.

The objection is overruled and 36-B and C are admitted as against the defendant Himmelfarb.

Mr. Robnett: Your Honor, I wonder if Mr. Strong is offering those as to the defendant Ormont? Those, as I understand [1151] it, are the defendant Himmelfarb's exhibits.

Mr. Strong: I assume that if I offer them as to the defendant Ormont the same reasons would prompt your Honor to deny them.

The Court: That is correct.

Mr. Robnett: There are some others that I believe you did offer as to Mr. Ormont, and I don't know whether the Court ruled on them or not.

Mr. Strong: It is these documents, your Honor.

The Court: 50 and 51?

Mr. Strong: Yes.

The Court: The ruling I made at the time of their admission will stand.

Mr. Robnett: As I recall, that was a separate ruling.

The Court: Yes. Ormont applies to Ormont and Himmelfarb applies to Himmelfarb only.

Mr. Strong: The Government rests.

The Court: The Government rests.

Mr. Katz: May I at this time also be heard again, Honor?

The Court: Yes.

Mr. Katz: If the Court please, this is now a motion and I do move this Court to acquit the defendants on Count 1 and Count 2 of the indictment, which are the only two counts in which an offense is attempted to have been alleged. [1151]

The Court: On Count 1, do not waste any time arguing it, I do not think that there has been any tie-in of the defendant Phillip Himmelfarb to the alleged offense of Sam Ormont. On Count 2, if you will confine your motion to that, I will hear from the District Attorney on Count 1. [1152]

Mr. Katz: If the Court please, with respect to Count 2, there is in evidence before this Court the personal income tax return for the calendar year 1944 for the defendant Phillip Himmelfarb, and the defendant's wife Ruth Himmelfarb. With respect to that exhibit, if the Court please, it has been presented in evidence. No testimony has been elicited of any kind or character from any person——

The Court: Yes, the signatures were identified.

Mr. Katz: I was going to say with respect to any question as to whether the income tax as therein reported was or was not correct. There is no evidence with respect to the matter shown in that report. There is no evidence before this Court——

The Court: Yes, there is.

Mr. Katz: We will go on to that. Now I think your Honor is going to refer to Exhibit 6.

The Court: That is right.

Mr. Katz: With respect to Exhibit 6, if the Court please, that was filed as a joint venture return, subsequent to March 15, 1945, the on or about date alleged in the indictment, and sometime about the 20th, I believe, of May, 1945—I am not trying to give the exact date.

The Court: 24th of May.

Mr. Katz: But about the 20th, which is subsequent in time to the return of the calendar year, with respect to this, [1153] and in my argument, if the Court please, I am having in mind, the evidence in the record against the defendant Phillip Himmelfarb; I am excluding from my mind, as I believe the Court has, or should, any evidence in the record as against the defendant Sam Ormont—with respect to that Exhibit 6 there is no testimony of any kind or character against the defendant Himmelfarb respecting what is shown thereon other than——

The Court: Yes, there is.

Mr. Katz: Other than his signature. That covers a period from May 1st, 1944 to April 30, 1945. Now, that covers a period part in 1944 and part in 1945.

There is no evidence against the defendant Himmelfarb as to whether any part of that income shown in Exhibit 6 was earned in 1944. It might have been; it might not have been, in so far as the evidence in this record against this defendant.

Unless it is shown that there was some income of

this defendant, in addition to what he reported in his calendar year return for 1944, and unless it is shown that that income was for the year 1944, and unless it is further shown that such income was reportable for the calendar year 1944, not for some other year, and unless it is shown there was an attempt to evade, or an evasion of such taxes as were earned in 1944, and reportable in that year, and unless it is shown that that was all wilful, I believe your Honor is going to have to agree [1154] that there has been no offense established, because what I have just named are the elements that go to make up the offense.

The Court: You must keep in mind, for the purpose of this motion, I am not sitting as a jury.

Mr. Katz: Your Honor is not sitting as a jury, except as a thirteenth juror.

The Court: No, nor as a thirteenth juror.

Mr. Katz: Your Honor has this obligation and this duty: First, your Honor must determine whether under the law, as a legal proposition, any offense has been stated. Secondly, your Honor must consider whether there is any evidence—

The Court: My function is to determine whether or not there is evidence in the record upon which reasonable men might differ.

Mr. Katz: That is all I am asking your Honor to do.

The Court: And as to whether or not the defendant Himmelfarb is guilty as charged in Count 2. My function is not to determine what the result of this evidence is. It isn't my judgment whether or

not reasonable men might differ; that somebody might conclude he is guilty.

Mr. Katz: I am going to use the language of this Court, and make the statement to your Honor that there is no evidence—there is not any evidence that any part of the income shown in the fiscal return was earned in the year 1944. I believe that is a true statement of fact. [1155]

The Court: Let me see Exhibit 6. No, I can't agree with you, Counsel. It says, United States Partnership Return of Income for Calendar Year 1944 or fiscal year beginning May 1st, 1944 and ending April 30, 1945. Miscellaneous Income.

Mr. Strong: May I show your Honor the original for more leisurely reading?

The Court: It will help. The print is fine enough on the original. No, I think the inference is fairly deducible from the face of the return that it was earned in 1944. In any event, from that coupled with the return filed by the two of them, I think that statement by Himmelfarb was admissible, which I have admitted, and the statement of Himmelfarb shows that the money was earned during that period.

Incidentally, on the matter of the fiscal year, which you will be getting to pretty quick, or somebody will, the regulation of the Treasury Department—I don't have the reference to it. I don't think the Government has yet submitted your instructions, have you?

Mr. Strong: No, not yet, your Honor. I wanted to see which way this trial went.

The Court: Do you have the regulation number, which permits only a fiscal year income to be filed by an agency which regularly keeps books of account?

Mr. Katz: There is no evidence here, that there were no books and records of account kept, your Honor. [1156]

The Court: What is the regulation number?

Mr. Strong: I don't know the number. It provides it shall be filed on the calendar year basis, unless the books are kept on a fiscal year basis.

The Court: There is evidence here that there was something kept. That is a question of fact for the jury to decide. [1157]

Mr. Katz: Even that isn't any evidence against the defendant Himmelfarb. Your Honor is now getting over into the defendant Ormont's statements.

The Court: His statement is he kept no books.

Mr. Katz: Your Honor is referring to—let me have Exhibit 50 again.

(The document referred to was passed to the Court.)

The Court: "During the period commencing May 1, 1944 and ending April 30 I received from the joint venture which I have engaged in with Samuel Ormont the sum of—" that isn't it. It must be the letter.

The Clerk: You have all the exhibits there, your Honor.

Mr. Strong: It says in it—

The Court: "The record is accurate. No other records are kept. All the moneys received are represented by the total reported. We kept a cumulative record."

Mr. Strong: Section 41 of the Internal Revenue Code—if your Honor wishes to see it I can pass it over.

(The volume referred to was passed to the Court.)

The Court: Section 41 of the Regulations 111.

Mr. Strong: The Internal Revenue Code is in small print, I understand.

The Court: I think the defendants would be entitled to have submitted to the jury as a question of fact whether or not those books were, or whether that little piece of paper was [1158] in compliance with this requirement so that they could file on a fiscal year basis.

Mr. Katz: With respect to the matter, if the Court please, of a cumulative record and that no other records were kept, if that can be said and deemed to be a statement or evidence that no books and records were kept, the fact is that what books or records are necessary are dependent upon the particular business or transactions, and where the fiscal return here indicates a return of a given sum without deductions for expenses of any kind or character, the cumulative record would constitute books and records.

Mr. Strong: I disagree, your Honor.

The Court: That is a question for the jury to

decide, whether or not if the taxpayer has no annual accounting period or does not keep books. Now it is a question for the jury to decide whether or not that little business is keeping books.

Mr. Strong: There is another regulation which I will submit to your Honor in the form of an instruction, which says they must be records which can be verified.

Mr. Katz: The point that I make, if the Court please, is that there is no evidence affirmatively that no books and records were kept, and consequently with just Exhibit 3, I believe it is, the defendant Himmerfarb's return, and Exhibit 6, there is nothing here before the Court in the way of any [1159] evidence that the defendant Himmelfarb received any income which was reportable over and above what he reported, which was reportable in any other manner than was reportable by him, or that there were any taxes due or owing by him to the Government.

The Court: No, I cannot agree with you. It is a question of fact for the jury to decide, and certainly upon which reasonable men might reach the conclusion that the defendants, as to their joint venture, kept no books and records. If that is the case, they were under an obligation to report and pay on an annual basis. If that is the case, Exhibit 6 shows that he received during the year 1944 a sum of money somewhere less than \$35,000 and more than he reported. Then the other exhibits, his return and his wife's return, shows that he did not report it. Therefore there is sufficient evidence in the record

upon which reasonable people might reach the conclusion that this defendant would be guilty as charged in Count 2.

Now as to Count 1, do you want to be heard?

Mr. Strong: No, I am satisfied with Count 2.

The Court: The motion for judgment of acquittal as to the defendant Himmelfarb is granted as to Count 1, and denied as to Count 2.

Mr. Katz: With respect to the matter of willfulness, isn't that a matter which the Court can consider that in the [1160] absence of any evidence showing willfulness that on that ground alone the Court has the power to grant an acquittal. I am assuming all that the Court said to be true.

The Court: Reasonable men can differ as to that. Reasonable men could reach the conclusion that what he did was willful.

Mr. Robnett: Yes, your Honor. I have some motions that I want to make to strike as well.

The Court: How long are you going to take?

Mr. Robnett: I think it will take me some little time. If it would be easier to take the recess before I started, that is all right with me.

The Court: We have to finish this trial this week if we have to work nights.

Mr. Robnett: I know, your Honor, but I want to protect my client's rights the best I know how, and it will take me some little time to make the motions. However, I am glad to proceed.

The Court: Suppose you proceed and outline your grounds to me without arguing them and then I can see what would be a justifiable time.

Mr. Robnett: Thank you, your Honor.

In the first instance, I wish to move to strike the conversation testified to by Mr. Phoebus, the witness Phoebus, as transpiring on the 18th day of May, 1945—if I can find [1161] the place.

The Court: Just state it and if you will give me the book and page, I have in mind the conversation.

Mr. Robnett: I believe it is on page 905 of the record.

I want to strike that entire conversation on the ground that no proper foundation was laid for the admission of it, and on the ground that the defendant Ormont was not prior thereto advised by the witness or anyone else representing the Government of his, Ormont's constitutional rights so that anything he said in that conversation could be used against him, or that he had a right to refuse to answer or that he had a right to counsel.

I base that now, your Honor—that is a renewal; I objected at the time, if you will recall and you overruled the objection.

The Court: You did not object to the testimony of the witness Eustice. You did object to the testimony of the witness Phoebus.

Mr. Robnett: I objected to the testimony of the witness Phoebus as to that conversation. I don't think the witness Eustice was there. I don't remember his testifying as to it.

At that time I objected on these same grounds. The Court I believe in its ruling had in mind that he was a deputy collector and therefore held that it wasn't probably necessary for him to do so because

he could not investigate violation of [1162] alleged fraud against the Government.

Since then I want to call the Court's attention to page 947 of the transcript wherein your Honor read Section 3654 of Title 26, the first paragraph of which applied to Internal Revenue agents, "shall see that all laws and regulations relating to the collection of Internal Revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection and punishment of any frauds in violation thereto."

Then you say, "Incidentally, there is a similar power given to the collector by Section 3654, and like authority to deputy collectors."

It was shown that Mr. Phoebus at that particular time, at the time of that conversation, was a deputy collector. That is in the record, your Honor, and therefore he would have had such authority to investigate frauds and there was no warning or any advice given Mr. Ormont whatsoever at that time. At that time, as you recall, the evidence showed there wasn't any until the 24th.

The Court: That is in the office upstairs; that is correct.

Mr. Robnett: And therefore I move to strike all of the testimony of Mr. Phoebus as to that conversation on the 18th day of May, 1945.

The Court: All right. Your next motion? [1163]

Mr. Robnett: My next motion, I move to strike at this time all evidence of Mr. Eustice, all evidence against this defendant, on the ground that it was admitted over objections and it was incompetent,

irrelevant and immaterial, based largely upon hearsay testimony, and hearsay testimony was admitted by virtue thereof, of the admission of his testimony, into the record after repeated objections to any such testimony. And also after a motion to strike portions of it and the running objection, as I understand, to that testimony on the grounds that I have stated, that it was incompetent, irrelevant and immaterial, and hearsay testimony, a great deal of it, based upon a number of things that were outside of the hearing of the defendant, conversations that he had with other persons, records that he had obtained from somewhere else or information he had gotten from some other agent or someone else, that he did not vouch for and would not, and that it would be hearsay as to Mr. Ormont.

The Court: On that motion I am satisfied that my rulings at the time were correct and the motion to strike the testimony of the witness Eustice is denied.

Mr. Robnett: Very well.

Now, your Honor, I believe that you denied a motion to strike part of his testimony and you based it upon the fact that there had been cross examination and that I had cross examined the witness.

The Court: That was on redirect examination.

Mr. Robnett: I beg your pardon?

The Court: That was on redirect examination; a portion of his testimony.

Mr. Robnett: That testimony, without taking your Honor's time to refer to the record—do you know what I am referring to; that I did make a

motion at the time to strike considerable of his testimony?

The Court: Yes.

Mr. Robnett: I wish to renew that motion at this time, on the ground stated therein, particularly on the ground that it is incompetent, irrelevant and immaterial, and based upon hearsay, no proper foundation having been laid for its introduction.

I wish to call your Honor's attention to the fact that we have in this action, as you recall, an understanding or stipulation that unless the counsel for the other defendant announced that he was not joining in any objection or motion or ruling that any and all objections, and any and all motions, made by any counsel would be deemed to have been made by the other counsel. We have had that throughout the trial.

The Court: Yes.

Mr. Robnett: Therefore, every objection that was made by Mr. Katz applies likewise to me, as though I had made the objections as to all of this evidence of Mr. Eustice, before it was introduced.

Mr. Strong: Absolutely. [1165] That applies also to objections made by Mr. Katz to questions asked by Mr. Robnett.

The Court: I don't see how that can be. I think it applied only, of course, to questions asked by Government counsel. In any event, giving consideration to it with reference to your client, the defendant Sam Ormont, I think my ruling was correct as to all.

Mr. Robnett: Your Honor, if you have in mind

that the cross-examination waived it, I would like to cite your Honor some authorities on that proposition.

The Court: Another conversation was not introduced on redirect. It was other things in the same conversation, that the witness had testified to on direct, and it was a limited amount of testimony, which I deemed that you had covered in your cross-examination.

Mr. Robnett: Perhaps I have to refer now to the volume. I think it is page 299, the one I am talking about, and that was during cross-examination, I think.

The Court: Before we go into discussion of this, will you state the rest of your motion, because if we are going to be all afternoon, I don't want to leave the jurors upstairs.

Mr. Robnett: I don't know how much more your Honor wants to listen to. I will have motions to follow; motions to strike.

The Court: You have some more motions to strike? [1166]

Mr. Robnett: Yes.

The Court: Then you will have a motion for judgment of acquittal?

Mr. Robnett: Yes. I will have separate motions to separate counts. I would like to be heard on them, not to a great extent. It will take me a little time, if your Honor please. I don't think it will be imposing too much, however.

The Court: It is not any imposition. What I am trying to do is to find out how long you are going to

be. In other words, I don't want to have the jury inconvenienced, and about fifteen minutes after four call them down, and tell them to go home.

Mr. Robnett: I suppose if your Honor will take a recess this afternoon, it will be about an hour, including the recess.

The Court: All right, call the jury down. The usual stipulation?

Mr. Strong: So stipulated.

Mr. Robnett: Yes.

Mr. Katz: So stipulated.

The Court: Ladies and gentlemen of the jury. I am sorry to have had to keep you here this far, this afternoon, but it appears at the present rate we are proceeding that if we conclude with the various arguments and motions which must be made out of the presence of the jury, it will be [1167] quite late. Rather than keep you here until 4:15, and taking only 15 minutes of your time, I believe it will be better if you are excused until tomorrow morning at 9:30 o'clock. You are therefore excused until that time. Remember the admonition.

(Short recess.) [1168]

The Court: All right, Mr. Robnett.

Mr. Robnett: I want to call your Honor's attention particularly to the fact that at the very outset of the case I moved this Court that no evidence whatsoever be admitted on the ground that the indictment didn't state a cause of action, and further that the defendants have been placed once in jeop-

ardly, and that that objection should go to the evidence thereafter to be admitted or offered.

Then on the afternoon of May 27, 1947 this occurred—it is on page 287 of the transcript—the witness Eustice was on the stand under direct examination and I made this motion:

“If the Court please, I move to strike out all the testimony the witness has given in this connection on the ground that it is partially based upon hearsay, but most of it is a mere assumption and conclusion of the witness. He has used, for instance, the item he testified to which showed that that there was a \$10,000 repayment loan he previously made. That is not income. Your Honor of course knows many of the items he has testified to here he said they were unexplained so far as he was concerned and it is purely a conclusion of the witness, it is not the kind of evidence to introduce before the jury to try to convict a man for evading income tax.” [1169]

Then there is some other discussion by Mr. Strong and then I, on the next page, 288, stated: “Other than that, there is no foundation.” That is on line 8.

Then on line 19, “No proper foundation has been laid for any of it by this witness. Further than that, there is no showing as to all of these things where he was getting his information from, and he is testifying here today concerning opinions. They may have been opinions, as he admitted as to the bonds obtained from someone else. It is hearsay. There is

not anything authentic about it. I never heard him testify he made all of that report.”

Further on page 289 again, “I don’t believe they have laid any foundation that this report he has before him was made by him from things he did examine.”

Then on page 290 you stated, your Honor: “I think it goes to the weight of the testimony of the witness.”

The Court: Yes, and I also stated there on page 288:

“I think all of that rather goes to the weight of the testimony of this witness. Whenever this witness has used the word ‘I find that his income was such-and-such’ and ‘his adjusted income should have been so much,’ it must be accepted only as the opinion and conclusion of the witness because, after all, income tax agents, so far as that phase of his [1170] testimony is concerned, is nothing more than an expert witness and the jury may regard his testimony if they desire in that respect. It goes to the weight and not to the admissibility.”

Mr. Robnett: Yes, your Honor. But his whole testimony of necessity was based upon things he did not know of his own knowledge and things that there was no proper foundation for him to consider.

The Court: In his opinion.

Mr. Robnett: In his opinion. They were not even properly matters for him to take into consideration because the prosecution had not laid any proper

foundation for them to be before him. I think it was much more than a question of the weight of the testimony, it went to the very heart of his testimony, whether he could even testify at all or not. If he couldn't, anyone could come in here and say, I have gotten information hither and yon and it is my opinion so-and-so. That is the effect of it. So I really am serious in saying to your Honor that I don't believe that that evidence is proper at all, any of his testimony. It is based upon matters dehors the record and that that witness, of necessity, had to take from someone else or from somebody else that was not before the Court nor the jury and couldn't be verified in any way. Much of it was hearsay testimony. He said he talked to people and that Mr. Phoebus had done this, or Mr. Someone else [1171] had done something. So that, as I say there, had been the prior objection made at the very outset. Then there were objections as we went along and before he had finished and gotten into it and really given the detrimental testimony that he has given, if his opinion is worth anything, I had this motion in the form of a motion and objection that no evidence be considered of his. I think that it was more than going to the mere weight of the testimony. [1172]

Mr. Robnett: Now, my motion is further upon this ground, that anything Mr. Eustice did, or anything anyone else did, was after Mr. Ormont was under a threat. That was suggested this morning, and I want to incorporate that, without repeating

it. I call your attention to the record. You know what I am referring to, I believe.

The Court: Yes.

Mr. Robnett: After the 18th day of May, 1945. Consequently, I wish to incorporate that as a further ground of my motion, and I want to make a motion further, as will be found on page 309 of the transcript, I believe; that is as to the bond, line 12. By the way, the witness has been talking about the bonds, and I move to strike all the evidence as to bonds, upon the ground that it was hearsay from the witness.

The Court: The ruling to it will be reserved.

Mr. Robnett: That is right, your Honor. It was reserved, and I urged it at that time on the very grounds I have been stating.

The Court: I will deny that. And on the reservation of my ruling I will overrule your objection to the motion to strike the testimony of the witness Eustice.

Mr. Robnett: My grounds of motion has not been completed, your Honor.

The Court: I am sorry. I thought you had completed them.

Mr. Robnett: As grounds for the motion I also wish to [1173] incorporate, without taking time to read it, each and every ground I urged in my motion to dismiss the indictment, the original, on the ground that it did not state an offense; and in my motion for a bill of particulars in this case, which, as I say, was denied in chief, most of it was denied,

if it may be considered they are offered in the record here, without restating each and every of those——

The Court: Yes.

Mr. Robnett: Thank you. Then I wish to add to my motion, on this motion to strike, the further ground that the indictment, particularly Count 1 of the indictment, and therefore the motion, as to this would be as to any evidence pertaining to the year 1944 by this witness, be stricken on the ground that in Count 1 of the indictment there is a variance in the proof and the charge in the indictment. The variance I raised once before, and in particular it is based upon Exhibit 3, I will make that certain. Yes, your Honor, in Exhibit 3, which is Sam Ormont's income tax return for the year 1944. That is what the indictment charges, and it says that he filed a false and fraudulent income and Victory tax return. That is the matter which they charge he committed the crime, about filing a false and fraudulent income tax and Victory tax return. And that this Exhibit 3 is a variance in the indictment. It should never have been admitted.

I now again move to strike it on the ground that it is [1174] not an income or Victory tax return, and there is no proof in this case that any such was ever filed by the defendant.

I believe that, your Honor, constitutes about all the ground for the motion to strike Mr. Eustice's testimony; and without having to go over all of the grounds again, it may be considered that I am making a separate motion on these same grounds, however, to strike all of Mr. Phoebus' testimony with

regard to the bonds and the list of bonds, and all his oral testimony concerning them, and concerning the funds with which they were bought, according to his opinion.

The Court: Mr. Phoebus?

Mr. Robnett: I mean Mr. Eustice's testimony; upon the same ground I move you to strike all of his testimony, and if I may, without waiting for a ruling, I would like to make a similar motion to strike the list of bonds that is in evidence here, Exhibit 42, on all those same grounds that I have stated, and likewise strike all testimony of Mr. Malin respecting them and that list; all testimony of Mr. Phoebus respecting that list of bonds; all testimony of Mr. Bircher respecting these bonds, considering that as a separate motion as to each one, rather than just one.

I want to move to strike all testimony of Mr. Phoebus as to any conversations respecting the year 1942; and a similar motion as to 1943 and a similar motion as to 1944.

The Court: Did Phoebus testify about 1942 and 1943? [1175]

Mr. Robnett: I don't know, without analyzing it, as to whether any of his testimony would be applicable to those first two years, excepting he did testify about conversations. That's what I have in mind, insofar as they might have any bearing on this case. He testified he was investigating all of the taxes at times. He did not go into any detail as to those years, I don't think. The ground of that motion being in addition to other grounds I have stated, as

the record shows, Mr. Ormont starting with the 18th of May, 1945 and through the 24th. [1176]

The Court: That is the 15th, isn't it; Isn't it May 15th?

Mr. Strong: That was corrected later to the 18th.

The Court: It is May 18th, is that right?

Mr. Strong: Yes.

Mr. Robnett: Going through May 24, 1945. And thereafter also the defendant cooperated in every way with the Department of the Internal Revenue, the Treasury Department of the United States; that he gave them any information and books and records that he had, gave them access to his bonds and his bank accounts and everything in that particular; told them that if he owed them any tax he was ready and willing to pay it.

The Court: This was on May 24th?

Mr. Robnett: This was on May 24th?

The Court: Are you moving to strike that testimony of May 24th?

Mr. Robnett: I am moving to strike all of his testimony, your Honor, on all dates, for this reason, that the Treasury Department of the United States has a policy that where a taxpayer does fully cooperate with them before investigation begins that there will be no criminal prosecution, and that was publicized all over the country, has been for years and is generally known—and your Honor I think can take judicial notice of it—and that thereafter at the time at least as to [1177] '42 and '43, that Mr. Ormont on May 24th gave them access to his books and records, told them what he knew and

all the things that your Honor knows in the record, that at that time not one of the Government agents had been assigned to or had begun any investigation of Mr. Ormont's income or income tax reports for the years 1942 or 1943.

There is in the record some evidence that they had recently been assigned to investigate his returns for 1944 only. You will recall Mr. Phoebus' testimony that that was their first assignment.

The Court: 1944?

Mr. Robnett: Was for 1944; yes, sir. And that it was later in the summer or during the other parts of the year than May 24th, later than that, when a different assignment was given them as to 1942 and 1943.

Therefore at that particular time on the 24th no investigation had been started, and there has been a ruling by the attorney for the Treasury Department, at least whatever authority it is, that the investigation under their policy does not begin until a man is specifically assigned to make that specific investigation which, as I say the record shows conclusively, none had been assigned for 1942 and 1943 prior to the conversations and the handing over of the books and the doing of all these other things.

I believe that covers the grounds of my motions to strike. [1178]

The Court: All the motions to strike are denied except your first motion to strike the testimony of the witness Phoebus of the conversation on May 18th, which is granted.

Mr. Robnett: Thank you, your Honor.

Mr. Strong: Can I be heard as to that?

The Court: May 18th and May 23rd, I think.

The warning was given on May 24th.

Mr. Robnett: All right.

The Court: Do you have anything new to add to what you have already said?

Mr. Strong: Yes. He was a deputy collector. There was no investigation.

The Court: Yes, but on having recourse to the statute, as I indicated in the transcript at the time I was reading it, that section authorized the Deputy Collector to conduct investigations of fraud on revenue matters.

Mr. Strong: But the evidence here is that he was going down to get the unpaid tax. There is no evidence that he was investigating fraud, if I understand your Honor correctly.

The Court: I understood his testimony was—I was just reading it again—"I had an assignment at that time to make an investigation of the income tax returns of Mr. Ormont and Mr. Himmelfarb for the year 1944."

Now I stated that I would take judicial notice of the fact that a deputy collector was not authorized to conduct a [1179] criminal investigation. After stating that I read the statute again and noticed that he is authorized by law to do that, or such duties I think as the collector assigns him to.

What did I say those sections were?

Mr. Robnett: I think I have them right here, your Honor.

The Court: "Every collector within his collection district shall see that all laws and regulations relating to the collection of Internal Revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection and punishment of any frauds in relation thereto. For such purposes he shall have the power to examine all persons, books, papers, accounts and premises, to administer oaths, to summon any person to produce books or to appear and testify under oath before him, and to compel compliance with such summons in the same manner as is provided in 3615.

"(b) Every deputy collector shall have like authority in every respect to collect the taxes levied or assessed within the portion of the district assigned to him which is by law vested in the collector himself. But each collector shall in every respect be responsible both to the United States and to individuals as the case may be for all money collected and for all acts done or neglected to be done by any of his deputies while acting as such. Every Internal Revenue agent shall see that all laws and regulations [1180] relating to the collection are faithfully executed and complied with and shall aid in the prevention, detection and punishment of any frauds."

Mr. Strong: May I read this part of the transcript to your Honor? This is cross-examination, and he was asked there:

"Q. Mr. Phoebus, as I understand from your testimony, you are employed by the United

States Government in the Internal Revenue Department thereof up to July 1, 1944 as what is known as a deputy collector.

“The Court: 1945, was it not?

“The Witness: 1945.

“Mr. Robnett: Pardon me. 1945.

“The Witness: That is correct; yes, sir.

“Q. How long have you been such deputy collector?

“A. Since August 27, 1942.

“Q. I don't know anything about the duties of the different departments and maybe some of the jurors don't. Will you tell me what your duties were as deputy collector?

“A. We call on taxpayers for delinquent taxes by means of information which is obtained from the files of the collector's office and to determine whether or not there were any delinquent taxes. I [1181] believe that fairly sums it up. There are other duties of the collector's office which I was never assigned to with respect to collecting taxes which have been assessed, that is, which have been recorded on the records as being due but not having been paid. I was never assigned to that part of the collector's duty but that was part of the function of the field division, the entire office.”

Then he goes one down here further to page 945:

“Q. And that was as you testified yesterday, that assignment was to investigate Mr. Ormont's returns for the calendar year 1944?

“A. I am not sure but I believe in my testimony yesterday I used the phrase ‘to determine the correct income tax liability’.”

May I submit to your Honor that that is what they were doing there, to determine the correct income tax liability.

The Court: I think that the witness’ testimony in respect to that is not the best evidence as to what his duties are.

Mr. Strong: On a particular occasion, your Honor?

The Court: The law also authorizes the Commissioner of Internal Revenue to issue rules and regulations. Now if he has issued a rule or regulation—I am not familiar with it—for the internal management of his department which limits [1182] the powers of deputy collectors, and my recollection is and has been that a deputy collector has no authority to investigate criminality, neither has an agent, only a special agent. In other words, if there is any criminality suspected in a case it is assigned to a special agent.

Mr. Strong: That is my understanding.

The Court: And until a special agent is assigned to it. But I do not know of any rule or regulation of the Internal Revenue Department that exists in relation to that. I suppose that if there is I can take judicial notice of it. But all I can take judicial notice of now is the power of a deputy collector as the statute provides, and in view of that power at that time I think that the ruling I made just now striking the testimony of Mr. Phoebus as to any

statements made on May 23rd and prior to that conversation in the office of Mr. Bircher—— [1183]

Mr. Strong: Would your Honor reserve ruling on that? I think there may be some regulation to assist your Honor in determining to the contrary. I will bring it in in the morning.

The Court: I will rule on it now. Counsel will want to know for his motion. I will grant the motion to strike it now. I must rule on it, because he is entitled to make another motion, and to know what evidence is in the record. Does that dispose of all motions to strike?

Mr. Robnett: It does not. I want to move to strike the testimony of Mr. Eustice on pages 843, 844 and 845, with regard to certain bonds therein. I won't stop to take time to read them. He was testifying about bonds. He was asked: In your examination from the records of the Acme Meat Company—bonds and checks—were those checks used to pay for bonds? I objected upon the ground that the books would be the best evidence, and it was asking for an opinion of the witness, and I called your attention several times to the fact that it was incompetent, irrelevant and immaterial. And your Honor, on page 845, in ruling said: The objection is not timely. Counsel cross-examined the witness at length upon the books and records and data of the Acme Meat Company, and now, upon that examination, I think you have waived any right to object which you may have. The objection is overruled.—That, of course, was the objection your Honor had in mind. It was after cross-examination. [1184]

The Court: Now, with relation to this, I think that you waived the right by not raising it at the time the witness testified concerning his examination of the Acme Meat Company's books.

Mr. Robnett: That is the point I have been trying to urge; that we had objected earlier.

The Court: That is right.

Mr. Robnett: And that Mr. Katz made objections to this before he was allowed to even use his exhibits, and went into voir dire examination, if you recall.

The Court: I think Mr. Eustice's testimony is all admissible. The motion will be denied.

Mr. Robnett: Very well. Then at this time, if the Court please, I now move for an order of this Honorable Court to acquit the defendant Sam Ormont.

First, I will take it in a little different order. On Count 2 of the indictment, which is the count as to Mr. Himmelfarb's taxes, and on the grounds stated by Mr. Katz in his motion to dismiss as to Mr. Himmelfarb on Count 1.

The Court: Without indicating this as a formal ruling at all, but in order to guide both counsel in connection with their preparation, and your views on the matter, it would seem to me that such motion should be denied as to Count 1, and granted as to Count 2. And I am doubtful if there is enough evidence in the record to let it go to the jury as to [1185] the years 1942 and 1943. About the only testimony in the record of 1942 and 1943 is the testimony of the witness Eustice, which was opinion

evidence. Perhaps Mr. Strong can point out to me some other evidence, but I don't believe there is any.

Mr. Robnett: I was going to make a separate motion for each of those counts.

The Court: State your motions formally for your record.

Mr. Robnett: Taking Count 2 first, because of the ruling your Honor had made as to Count 1, that is the count of Mr. Himmelfarb's income, or alleged income, I thought from your Honor's ruling awhile ago, in favor of Mr. Himmelfarb, if I understood it correctly, on Count 1, which is Mr. Ormont's income, perhaps I would not need to argue on those grounds.

I move to dismiss that, there being no evidence whatsoever to connect Mr. Ormont with Count 2; and all the evidence would be hearsay and incompetent. It hasn't even been admitted as to Count 1, and there is insufficient evidence to warrant it going to the jury, and the defendant should be acquitted on Count 2 by your Honor.

The Court: State your other counts. Just state your motion, and then I will indicate my preliminary observation, and will want to hear from the Government.

Mr. Robnett: As to Counts 3 and 4, may it be considered I am making separate motions as to those?

The Court: Yes. [1186]

Mr. Robnett: That there has been no proof or any evidence by this defendant; no sufficient proof to warrant it going to the jury. The *corpus delicti*

has not been established, nor has any wilfulness or intent of any kind been established, and it has not been established that the defendant Ormont did, in any one of those years, evade, or attempt to evade, any of his income, or reporting any of his income. And the evidence on that is wholly insufficient, and is hearsay, and is based upon hearsay testimony, and is incompetent evidence.

Without going into other details on it, I think that will be sufficient ground as to each of those two counts.

And I want to make a separate motion also for acquittal on Count 1, on the same grounds that were stated, I believe, by Mr. Katz, in his motion as to Count 2. That is the one that would apply to him, and I don't know that it is necessary to add any additional grounds.

In any event, there has been no wilfulness shown as to Mr. Ormont. As the record stands, all taxes have been paid, or nearly so, and your Honor will recall that the calculation showed that we had paid as much tax as the Government would have been entitled to, even if we accounted wrong.

There is no evidence shown of any criminal intent, or any attempt to evade; especially as to Mr. Ormont the evidence is all the other way. It shows he was always ready and willing to pay as he thought he should pay, and accounted as he [1187] thought he should, according to the testimony of the Government witnesses, and he never told them at any time anything that would indicate he had tried to evade the truth; that the only thing he was inter-

ested in was that the other department should not hear where the income came from.

I think that's sufficient.

The Court: In order that you may properly direct your argument, the way I view it, the motion should be denied as to Count 1, and granted as to Counts 2, 3 and 4, as to the defendant Ormont. That is not a final ruling, so the burden is upon you to show me wherein the testimony is deficient, if it is, on Count 1.

It looks to me like it is pretty clear, though, for the purposes of this motion, as to Count 1, that is, the 1944 income tax, without repeating the things I indicated to Mr. Katz when he was arguing, there was the return, there was the subsequent return, there were statements which are admissible statements, all of those showing the amount of money. In addition to that there is the date of the purchase of the bonds in the year 1944.

Mr. Robnett: There was only \$5,000, your Honor. You will remember the bonds were purchased in 1943.

The Court: Whatever bonds there were were purchased in 1944. So there is sufficient in the record so I cannot say that reasonable men could not reach the conclusion that the [1188] defendant would be guilty beyond a reasonable doubt as to Count 1.

As to Count 2, I don't think there is any evidence in the record which would connect him with the income tax return of the defendant Phillip Himmel-farb, only by the very widest possible stretch of an

inference, which I don't think I would be justified in indulging.

As to Counts 3 and 4, I would like to hear from the Government, because watching the testimony come in, the only testimony that I recall which related to the defendant Ormont, for the years 1942 and 1943, was testimony of the witness Eustice which, as I have indicated, is opinion testimony.

Mr. Robnett: You will recall that the Government witness also said those years were properly accounted for, and he did the accounting, and Mr. Ormont did not know anything about it. He only signed it, and sent them in. You will remember that Mr. Link made those reports. He said they were correct for those years.

The Court: Yes.

Mr. Robnett: May it be understood as to Count 1——

The Court: There was some testimony, outside of Eustice's testimony, by Mr. Link, that he found this batch in 1945.

Mr. Robnett: Yes, he found that in 1945.

The Court: But there were in 1942——

Mr. Strong: And 1946. [1189]

The Court: 1942 and 1943?

Mr. Strong: I think so; invoices for 1943.

Mr. Robnett: There have been no calculations on that. It was his duty to enter them; not Mr. Ormont's. So far as I can see, glancing through them, every one of them is in 1942.

May it be considered that all of my grounds, which I stated on my motion to strike, all of my

grounds stated in my motion to dismiss the indictment, and motions I have made here today, motion for a Bill of Particulars, and the grounds stated there, may be considered as part of my motion on Count 1?

The Court: For a judgment of acquittal?

Mr. Robnett: Yes, your Honor.

The Court: They may be so considered.

Mr. Strong: There is no point in my repeating what I said in connection with Count 2, since I have already said it. May it be considered as though I have restated it now?

The Court: Yes. The motion for a judgment of acquittal as to Sam Ormont, as to Count 2, is granted.

Mr. Strong: As to Counts 3 and 4, your Honor expressed the opinion that the only testimony was that of Mr. Eustice. I submit to your Honor there is in evidence the bank record, and every one of the other records, which on their face show the deposit of money in excess of the amount reported.

In addition to that, in the case of the testimony of Mr. [1190] Eustice, analyzing those records which are all in evidence as physical evidence before the Court, besides that there were bonds bought in 1943. I think some were bought in 1942, if I am not mistaken, in Government's Exhibit 42. Bonds bought in 1943 and bonds bought in 1942, as shown by Government's Exhibit 42.

In addition to that I call your Honor's attention to the testimony of Mr. Link. Mr. Link testified that these are the slips which were never presented

to him apparently for entry into the books, and each and every one of those invoices have the word "Paid" or the initials "Pd." with the date, showing some date in 1942, signed by Ormont, which, on the face of the documents, shows he received money not reported on his books, and is not part of his return for that year. [1191]

Besides that, Mr. Link testified of course that Mr. Ormont asked him to falsify the records for purposes of Mr. Link. I think that that is very important testimony. The falsification related to figures which Mr. Ormont wanted to have changed for his own purposes.

And those figures, incidentally, once they are changed are figures which tend to show that the costs for the goods which he purchased was beyond that which he actually paid, so there is a falsification right on the face of it, as to how much he expended, which is part of the money which he deducted from his gross income for that year.

So that we don't only have Mr. Eustice's testimony but we have Mr. Link's testimony as to falsification, as to the actual moneys received as shown by those invoices which, on their face, have Mr. Ormont's signature.

As to the moneys which he saw the defendant Ormont receiving and making entries on these sheets of paper which the witness testified to, in addition to these invoice moneys, the bonds themselves showing they were purchased during that year and the record showing deposits during that year, all present before the Court.

I submit to your Honor that on the basis of that evidence alone there is enough to permit the case to go to the jury on Counts 3 and 4.

But in addition, I submit to your Honor that the jury can [1192] take into account the entire practice followed by the defendant Ormont throughout 1942, '43 and '44 of receiving side money, of falsifying records, of concealing his assets. I think they can even consider that backwards in determining willfulness on his part. It is a connected series of same transactions all the way through. It isn't separate transactions.

In addition there of course is the conversations in which the defendant made various admissions as to how he bought the bonds and why he put them in his mother's name, and things of that kind.

The Court: Conversations about 1942?

Mr. Strong: All the bonds. He was talking about all the bonds as they were coming out of the box, as they were being recorded, and as to one of which he wanted to know whether as a matter of fact he could add his mother's name.

But even if we were to leave out the conversations with reference to how he was operating in 1944, Mr. Link's testimony, as I have indicated, the records themselves in evidence, which are better evidence of what was in those accounts than anything Mr. Eustice said about them, and all he was talking about were those records which were right here in court and which are in evidence and which can be examined by the jury and from which I can urge that, even if Mr. Eustice hadn't said anything about it.

Then there are the bonds themselves and various other indications which have been submitted, and I submit that there is enough to go to the jury on Counts 3 and 4 on that basis.

The Court: I think he is probably right, Mr. Robnett. I may be pardoned for saying this, but if I had to weigh Mr. Link's testimony I wouldn't give it much credence, but the jury might believe him.

Mr. Robnett: Well, your Honor, Mr. Link's testimony, as I understood it, was not that there was anything wrong, that he say anything done in '42 or '43, but Mr. Link testified——

The Court: He testified about these statements.

Mr. Robnett: Yes, but he testified about those, that the first time he saw them was in 1945. There is nothing here to show that they weren't accounted for in 1942.

The Court: He said that he didn't enter them on the books.

Mr. Robnett: He said he didn't enter them on the books but no witness testified for the Government that they weren't accounted for and the tax paid on them.

The Court: But he testified that he made the return out.

Mr. Robnett: Yes, he did.

The Court: From the books.

Mr. Robnett: That they were correct, that according to his knowledge they were absolutely correct, those returns.

Now you must remember he also testified that for

13 or 14 years he had been the sole bookkeeper except during a little [1194] absence now and then, and that he did all the bookkeeping.

The Court: I think you can argue that to the jury. I think that goes to whether or not his testimony is or is not to be believed.

Mr. Robnett: That only pertains to 1942, your Honor. In 1943 Mr. Link doesn't do anything. They can't sustain anything on 1943, even if your Honor considered that these could go in, these invoices.

The Court: What about the records of the bank, the bank deposits and purchase of bonds?

Mr. Robnett: There are records of the bank which show they are all accounted for even by their own accountant. He only says that he can't find where certain bonds were purchased, where he got the income for that, and he assumed that he had an outside income. He doesn't say that this shows up on the bank records that he got money there and didn't account for it, your Honor. He accounts for \$37,000, Mr. Eustice does, and every witness says this, that Mr. Ormont said all the time and over the years, and Mr. Bircher this morning said so, that over the years he, Mr. Ormont, had been saving money and had cash with which to purchase bonds and had purchased bonds and paid some of the money for bonds.

The Court: If I were sitting in the jury box on the years 1942 and 1943 I think that I would acquit the defendant, but sitting as a judge here and passing upon the question as [1195] to whether other

reasonable men might reach a different conclusion, I think as to both of those, from the evidence that is in the record here, that they could reach the conclusion that the defendant Ormont was guilty, and therefore I think I will have to deny your motions.

So on the motion for judgment of acquittal as to Sam Ormont, it is denied as to Counts 1, 3 and 4, and is granted as to Count 2.

Mr. Robnett: Very well, your Honor.

The Court: Let me see, we will be ready to resume at 9:30? How long do you think you will be, Mr. Robnett? Can you give me an estimate now?

Mr. Robnett: Yes, I can give you an estimate. I believe that I could put my evidence in in a day.

The Court: In a day?

Mr. Robnett: I believe I can. I won't promise, but I believe I can.

The Court: It depends then upon the extent of the cross-examination?

Mr. Robnett: Yes, that would depend upon that, of course.

The Court: And you, Mr. Katz?

Mr. Katz: If the Court please, I think I will have a better idea tomorrow morning as to how much time I will require. I hadn't anticipated that I would be here tomorrow [1196] morning but in view of the fact that I will now be back, your Honor, I will make the determination this evening.

The Court: Very well. If you can give me an estimate tomorrow I would appreciate it because I want to finish the case this week and I want to decide whether we are going to have to have longer

or shorter sessions. I don't want to press you, counsel. I don't want counsel on my account to forego anything at all which they think they should do on behalf of their clients.

Mr. Robnett: I will say this, I don't know what your rule is on it, or if you have any rule, that I feel having to cover three counts now with your Honor's ruling that it will require, as you may see our transcript is very large, a considerable time for my argument to the jury, if your Honor will be kind enough to let me do it, and I feel it is the only way I can present the evidence. There have been a great many exhibits which the jury haven't seen and I do think it will take considerable time for that. I will not delay, I will present my case with all dispatch.

The Court: It is not my disposition to deny counsel the right to present an argument to the jury. I haven't had any lawyers take advantage of me yet in that respect.

(Recess until 9:30.)

(Whereupon, at 4:20 o'clock p.m., a recess was taken until 9:30 o'clock a.m., Wednesday, June 11, 1947.) [1197]

Los Angeles, California, June 11, 1947

9:30 o'Clock A.M.

The Court: United States vs. Ormont and Himmelfarb.

Mr. Strong: Ready.

Mr. Katz: Ready.

Mr. Robnett: Ready.

The Court: Usual stipulation?

Mr. Strong: Yes, your Honor.

Mr. Katz: Usual stipulation.

Mr. Robnett: So stipulated.

The Court: Do you wish to make an opening statement, Mr. Robnett.

Mr. Robnett: Not at this time. Mr. Katz has his matter to present and then, if I may reserve until he is through.

The Court: Very well. Mr. Katz, do you wish to make an opening statement?

Mr. Katz: I have already made mine, your Honor.

The Court: Very well.

Mr. Robnett: After he presents his evidence is what I meant by reserving mine, your Honor.

The Court: Very well.

Mr. Katz: If the Court please, the defendant Himmelfarb offers in evidence income tax return for the calendar year 1945 for the defendant Phillip Himmelfarb, and the income tax return for the calendar year 1945 filed by Ruth Himmelfarb, both of which have been obtained through the courtesy of Mr. Strong.

The Clerk: GG and JJ; Phillip Himmelfarb will be GG and Ruth Himmelfarb will be HH.

Mr. Strong: No objection.

(The income tax returns referred to were received in evidence and marked Defendant's Exhibits GG and HH respectively.)

Mr. Robnett: May it be understood, your Honor, that the evidence offered by Mr. Katz is not being offered on behalf of Mr. Ormont and is not binding upon him, and that I have objected to the same on the ground that it is incompetent, irrelevant and immaterial and hearsay as to the defendant Ormont. You will recall the situation as to the charges.

The Court: Yes.

By the way, I should advise the jury at this time that the case is now pending against Sam Ormont only on Count 1. That is the 1944 income tax return of Sam Ormont. It is now pending against the defendant Himmelfarb only as to Count 2 and no other counts against the defendant Phillip Himmelfarb. It is now pending against Sam Ormont only as to Counts 3 and 4, which are 1942 and 1943.

Mr. Robnett: I would ask your Honor also at this time to kindly instruct the jury that the evidence of Mr. Phoebus as to all conversations prior to May 24, 1944 have been stricken from the record.

The Court: That is correct. All the conversations by Mr. Phoebus with the defendant Ormont, which were allowed in evidence heretofore prior to May 24—May 24th was the incident in the office of Mr. Bircher in the Federal Building where he was warned of his rights—all previous conversations

with the defendant Ormont are stricken from the record, and the jury instructed to disregard it.

Mr. Strong: Would you also advise the jury that there was only one previous conversation testified to by Mr. Phoebus?

The Court: No, there were two, May 18th and a short one on May 23. I don't know that there was any conversation that they entered into at that time; it was a visit at the plant, I believe.

Mr. Strong: Yes. We did not get that far.

The Court: I believe that is correct.

Mr. Katz: If the Court please, also we ask that a series of checks, payable to the Collector of Internal Revenue, be marked for identification as one exhibit, and another series of checks payable to the Collector of Internal Revenue be marked for identification as another exhibit.

The Court: Are they different years?

Mr. Katz: They are different years.

The Court: What is the first year?

Mr. Katz: 1944.

The Court: 1944 checks will be II and 1945 checks will be JJ. [1203]

(The checks referred to were marked Defendant's Exhibits II and JJ respectively for identification.) [1204]

Mr. Katz: At this time, if the Court please, I will call Mr. Ralph Kibbee.